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REPORTS OF CASES

ADJUDGED IN THE

HIGH COURT OF CHANCERY

BY

THE VICE-CHANCELLOR SIR JOHN STUART.

BY

J. W. DE LONGUEVILLE GIFFARD,

(OF THE INNER TEMPLE,)

ESQUIRE, BARRISTER-AT-LAW.

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ERRATUM.—Page 593, fourth line from bottom of marginal epitome, for "default" read "death."

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

High Court of Chancery.

COMMENCING IN

MICHAELMAS TERM, 22 VIC. 1859.

1859.

Nov. 3d, 4th,
7th, 8th, 9th,
10th, 11th,
12th, 14th,
15th, 16th,
17th, 18th,
21st, & Dec.
10th.

PROLE v. SOADY.

THIS bill was filed by the infant children of Charlotte Ruth Prole, deceased, against the devisees under Dr. Dickson's will, and against their father and the trustees of an alleged settlement made on the marriage of their mother deceased, praying,

First, that it may be declared that the plaintiffs, under the circumstances aforesaid, are entitled to have the estate and property at Edrington, and the sum of 105,000 sicca rupees in the bill mentioned, now invested in India Transfer Loan Stock, duly settled pursuant to the agreement and representation of the said Anthony Dickson, the testator; and that the defendants Soady may be decreed to do all such acts as are necessary for the due settlement thereof, and that it may be declared that they are trustees for that purpose, and may be decreed to deliver over the said documents.

Bill by infants against the devisee of their grandfather, to establish a settlement of real and personal estate alleged to have been made or promised on the marriage of their parents. The Court, on parol evidence that the marriage had taken place on the faith of representations made by the testator previously to the marriage, and on evidence of representations

Secondly, that it may be declared that, in respect of the made by him after the marriage, directed a settlement in accordance with such representations, though the bill was not filed until seventeen years afterwards.

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matters aforesaid, the plaintiffs are creditors on the real and personal estate of the said Anthony Dickson, and that such relief may be given them as is consistent with their being such creditors; and that this, so far as it is necessary, and in particular in respect of the plaintiffs' interest in the said stock, may be taken as a suit on behalf of themselves and all other the creditors of the said Anthony Dickson, and that for the purposes aforesaid all proper directions may be given.

Thirdly, that the plaintiffs' interest, whether under or against the said will and codicil, may be duly secured, and all requisite directions given for that purpose.

The bill also prayed for an injunction to restrain the receipt of the rents, and from dealing with the said property generally.

The bill alleged that Charlotte Ruth Prole was the daughter of Dr. Dickson, who had resided in India, and in 1830 returned to Scotland, where he purchased the Edrington estate; that in 1835, Dr. Dickson married his second wife; that about 1837, the defendant W. W. Prole became acquainted with Dr. Dickson, which acquaintance was renewed in 1839, when he met Dr. Dickson at Jersey, where he was temporarily resident with his wife, his daughter Charlotte Ruth Dickson, and his niece, now Mrs. Soady, the defendant. That Dr. Dickson informed W. W. Prole of a marriage which had recently taken place between his niece and Major Soady, and said he had been induced to give his niece a considerable sum as a marriage portion, to get her off his hands; and that all the rest of his property, including the estate at Edrington, except some legacies to distant relations, would now go to his said daughter. That on the faith of these representations, the defendant W. W. Prole proposed for Miss Dickson and was accepted, Dr. Dickson giving his consent with great pleasure. After the consent to the marriage, it was agreed between W. W. Prole and Dr. Dickson, that, in consideration of the

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marriage, and of Prole settling a family estate in Devonshire to which Prole was entitled in tail, subject to his father's and mother's life interest, Dr. Dickson should settle the Edrington estate (subject to 200*l.* a year to his then wife and his own life interest), on Charlotte Ruth Dickson and W. W. Prole for their lives, and after their decease on their children, if any. It was also arranged, that, as Dr. Dickson had given all his spare ready money to his niece as a marriage portion, no fortune should be given with his daughter on her marriage; but he agreed to settle the 105,000 sicca rupees, which he stated he always intended his daughter to have at his decease, on his daughter and her husband for life, and then in favour of their children, and that he would do so irrevocably. He also promised to leave his daughter all his other property, which was considerable; the estate at Edrington, and the sicca rupees, he spoke of and treated as to be at once irrevocably settled. The marriage settlement of W. W. Prole proceeded entirely on the faith of the settlement which Dr. Dickson first promised and afterwards represented he had made. The said Dr. Dickson requested W. W. Prole to write to his father and mother requesting their consent, which was done, Mr. Prole having written back his consent, and invited Dr. Dickson to visit him at Croyde (Devon), to which Dr. Dickson sent the following reply:—

“Royal Hotel, Jersey, March 22d, 1839.

“Dear Sir,—The receipt of your letter has given Mrs. Dickson and myself the most sincere pleasure, and it is most satisfactory for us to learn that your son's selection of my daughter meets with your approbation. Your son is all that I could wish him to be, with one failing only, that is being rather inclined to extravagance, but this we must endeavour to cure. I hope that you will be pleased with my daughter; she has good natural abilities, a sweet

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temper, and I am convinced that she will make a careful and an economical helpmate. At my decease her fortune will be considerable. In the same kind and friendly manner in which it is given, Mrs. Dickson and myself accept your invitation to Croyde, and upon our return from the Continent shall have the pleasure of waiting upon you. Mrs. Dickson and myself beg to present our most kind regards and best wishes to yourself and family; and, in the anticipation of much real happiness from our visit to Croyde,

“ I have the honour to be, dear Sir,

“ Yours truly,

“ A. DICKSON.”

W. W. Prole shortly afterwards went to England, and made his solicitor prepare a settlement of his property in Devonshire, dated the 16th of April, 1839, whereby the estate at Croyde, subject to the life estates of his parents, was conveyed to the defendant G. F. Knight, George Turnbull (Dr. Dickson's solicitor), and Robert Chapman, their heirs and assigns, upon trust, after the marriage to pay the rents and profits to Charlotte Ruth Prole for her separate use for life, remainder to the use of W. W. Prole for life, remainder to the eldest son of the marriage in tail; and in default, to the use of the daughters of the same marriage in tail, as tenants in common; and in default, remainder to W. W. Prole, his heirs and assigns. The indenture also assigned to the trustees a policy of 5000*l.*, payable if W. W. Prole died in his parents' lifetime, the proceeds of which, with the consent of Charlotte Ruth Prole, were to be invested, the interest to be paid to her for life, remainder to the children of the marriage as she should direct; and in default of and subject to such directions, equally among her children at twenty-one or marriage; and in default of children, then as Charlotte Ruth Prole should appoint; and in default, on trust for W. W. Prole, his executors, administrators, and assigns.

The 16th and 17th paragraphs of the bill were as follows :—

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“ The said Anthony Dickson, after he had approved the said settlement, and before the execution thereof by the said William Watson Prole, read over to the defendant William Watson Prole certain documents, which he stated were the settlement he had promised to make. It was in the Scotch form, and one of such documents purported to convey and assign the estate at Edrington, and all his the said Anthony Dickson's other property, to the said George Turnbull, since deceased, and the defendant, the Reverend George Fulton Knight, upon such trusts as the said Anthony Dickson should direct, by instructions to be signed by him ; and the other of such documents contained the instructions concerning the said Anthony Dickson's property comprised in the former document, and which instructions directed that the trustees named in the first-mentioned document should hold the said estate at Edrington and the said 105,000 sicca rupees in the 5 per cent. India Loan Stock, upon trust for the benefit of the said Charlotte Ruth Prole for her life, and after her decease for the benefit of the said William Watson Prole for his life, and after his decease for the benefit of the children of the said intended marriage, subject nevertheless, as to the said estate at Edrington, to the payment of the sum of 200*l.* a year to the said wife of the said Anthony Dickson for her life ; and the said Anthony Dickson also stated, with respect to the rest of his property not comprised in the said instructions, that it would all belong to the said Charlotte Ruth Prole, subject to certain legacies. The said last-mentioned documents were duly executed by the said Anthony Dickson, and, as is believed, in the presence of Colonel Browne (since deceased), and Colonel Baldock, now in Australia. The said Anthony Dickson stated and represented to the said William Watson Prole, that the said deeds or documents were irrevocable, and never could be altered. There

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were trustees named in them ; the property was purported to be conveyed and assigned to them in trust ; George Fulton Knight is the survivor of the said trustees, and he has declined to take any proceedings as plaintiff."

17. " The defendant William Watson Prole made and afterwards executed his aforesaid settlement of the said estate in Devonshire, in consequence of and in reliance on the said promise and agreement and representation of the said Anthony Dickson ; it was prepared in the belief that the settlement promised by the said Anthony Dickson would be made by him ; and it was executed previously to and in contemplation of the said marriage which was solemnized in the belief, on the part of the said William Watson Prole, that the said Anthony Dickson had in and by the said document and deeds, and in manner aforesaid, irrevocably settled both Edrington and the said sum of sicca rupees ; and the said William Watson Prole believed the aforesaid representations of the said Anthony Dickson to be true, and acted on the faith thereof, by marrying and executing the aforesaid settlement on his part. The daughter of the said Anthony Dickson also acted and married on the faith thereof."

The bill further alleged that the marriage between W. W. Prole and Charlotte Ruth Dickson was solemnized at Jersey in April, 1839, shortly after the execution of the said deeds ; the said marriage was solemnized on the faith of the aforesaid representation, and in the belief that Edrington and the said sum of sicca rupees were irrevocably settled in the manner and on the trusts aforesaid. It was arranged between Dr. Dickson and W. W. Prole, that, after the marriage, Chapman, one of the trustees, should take the deeds to London, and send the settlement made by Dr. Dickson, and a copy of that made by Prole to Mr. George Turnbull, a writer to the signet and a trustee of both settlements. This was done, and Mr. Turnbull wrote to Mr. Chapman the following letter :—

“ Edinburgh, June 3, 1839.

“ Dear Sir,—I have the pleasure to acknowledge the receipt of your letter of the 3d ult., with a copy of a disentailing deed granted to B. J. Chapman, Esq., by Messrs. W. & W. W. Prole, dated the 9th of April last; and also a copy of the deed of settlement of the marriage of W. W. Prole, Esq., and Miss Dickson, dated the 16th April last. The parcel contained a packet addressed by Dr. Dickson to me. I am glad to learn all our friends are well.

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“ I remain, dear Sir,

“ Your most obedient servant,

“ GEORGE TURNBULL.”

That the packet contained what had been represented, and what W. W. Prole believed, to be an irrevocable settlement of the Edrington estate and the sicca rupees. After the celebration of the marriage, W. W. Prole and his wife went to France, and were joined there by Dr. Dickson and his wife; and in September returned to England, where they paid a visit to W. Prole, senior, at Croyde, where Dr. Dickson frequently represented and stated he had irrevocably settled the Edrington estate and other property on his daughter and her husband and children, but that they would have to pay Mrs. Dickson 200*l.* a year out of Edrington for life. Dr. Dickson presented his daughter on that occasion with very valuable jewels, which had been her mother's. In 1840, Dr. Dickson returned to Edrington. In May, 1847, Charlotte Ruth Prole died, leaving the two infant plaintiffs, and in 1850 W. W. Prole married again. In 1851, Mrs. Dickson died.

The bill then proceeded to allege that Dr. Dickson was very advanced in years; that he resided with the defendants, Major and Mrs. Soady, and that the latter had great influence over him, and prevented him from seeing his daughter's children and his nearest relatives,

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particularly during his last illness, which she concealed from the plaintiffs; and that she and her husband used their influence with Dr. Dickson to defeat their rights, and to obtain the making of the will and codicil.

Dr. Dickson died in December, 1855, being domiciled in Scotland, having by his will devised the Edrington estate to Mrs. Soady and the heirs of her body. He bequeathed to the plaintiffs a bond of their father's for 3000*l.*; and he appointed Mrs. Soady his sole executrix, and gave 5000*l.* to Messrs. Turnbull on trust as to 2500*l.* for the plaintiff Ronald L. D. Prole, to be paid at twenty-one, and as to the remaining 2500*l.*, on trust for the plaintiff Charlotte A. D. Prole at twenty-one, or marriage, under the declaration applicable to females. He directed the income to be applied for the maintenance and education of the plaintiffs, with a proviso in case of the plaintiffs' death under twenty-one, or as to Charlotte A. D. Prole's death under that age or marriage, the legacies or legacy should become part of the residue of his estate. The testator reserved his own life interest out of the Mains estate, reserving power to revoke the instrument, in whole or in part; but declaring that the same, so far as not altered, should be valid, though found lying in his repository or in the custody of any person to whom he might intrust the same undelivered at the time of his death, with the delivery whereof he had dispensed and did thereby dispense for ever, and consented to the registration thereof. By a codicil dated the 17th of March, 1855, he restricted to 4000*l.* the legacy of 5000*l.* given to George and John Turnbull, and instead gave to John Turnbull, George being dead, 4000*l.* on trust to pay to each of the plaintiffs 2000*l.*

On accidentally hearing of the death of Dr. Dickson, W. Prole wrote to George Turnbull for a copy of the settlement, but was informed by John Turnbull that he had not got it. Mr. Knight, the trustee, subsequently directed a Mr. Capels, a writer of the signet, to see

Mr. John Turnbull on the subject, which led to a long correspondence, which resulted in the plaintiffs' filing this bill. The 51st paragraph of the bill was as follows:—

“The plaintiffs show that the said Anthony Dickson, previously to and in contemplation and in consequence of the marriage of their father and mother, not only promised and agreed to settle in manner aforesaid the said sum of sicca rupees so invested as aforesaid and the Edrington estate, but in addition thereto signed and executed an instrument containing the complete terms of such settlement, which he represented to be irrevocable, and it was believed by the said William Watson Prole to be irrevocable; and even if it was not in terms irrevocable, any revocation thereof was a fraud on the part of the said Anthony Dickson, and contrary to the agreement he entered into, and the representations he made and the engagements he had entered into.

The evidence on which his Honour, in his judgment, mainly relied was to the following effect. William Watson Prole (paragraphs 9 to 17) deposed as follows:—

9. “The said Anthony Dickson informed me of the marriage which had just taken place between Major Soady and his niece, and said he had been induced to give her a considerable sum as a marriage portion to get her off his hands; and that all the rest of his property, including Edrington, except some legacies to distant relatives, would now go to his daughter.

10. “On the faith of these representations I proposed to Charlotte Ruth Prole and received her permission to ask Dr. Dickson's consent to our marriage, which he readily gave, saying it was what he had long wished for, and that he gave his consent with great pleasure.

11. “After the marriage had been consented to as aforesaid, it was arranged and agreed upon by me and Dr. Dickson, that, in consideration of the marriage and of my settling a family estate in Devonshire to which I was entitled in tail, subject to my father and mother's life

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interest, Dr. Dickson would settle the Edrington estate (subject to the payment of 200*l.* a year to his then wife for life and to his own life interest), on his daughter and myself for our lives, and after our death on our children, if any. It was also arranged that as Dr. Dickson had given all his spare ready money to his niece as a marriage portion, no fortune should be given with his daughter at the time of her marriage, but he agreed to settle on his death 105,000 sicca rupees which he had invested on 5 per cent. India Loan Stock, which he stated to me he always intended C. R. Prole should have on his decease. He agreed to settle this in favour of his daughter and myself for our lives, and then in favour of our children, and that he would do so irrevocably. He also promised to leave to her all his other property, which was considerable, on his death, over and above that at Edrington and the sicca rupees. The Edrington estate and the sicca rupees he spoke of and treated as to be at once irrevocably settled, and my marriage and settlement proceeded entirely on the faith of the settlement which Dr. Dickson first promised and afterwards represented he had made."

Paragraphs 12 and 13 stated that Dr. Dickson requested W. W. Prole to write to his parents asking their consent; that he did so; that his father, in reply, consented, and invited Dr. Dickson to Croyde, who wrote the letter of the 22d of March, 1839, *vide antè*, page 3.

14. "As Dr. Dickson intended to travel, it was arranged that the marriage should take place immediately. I went to England and instructed my solicitor to prepare the necessary settlement of the Devonshire property.

15. "That I returned to Jersey in the beginning of April, 1839, with the settlement, which was approved by Dr. Dickson." Then followed the settlement by which the estate at Croyde was conveyed subject to the life estate of his parents, "to the use of G. F. Knight, G. Turnbull, and R. Chapman, their heirs and assigns, on trust to pay the rents,

&c., to C. R. Prole for life, remainder to W. W. Prole for life, remainder to the eldest son of the marriage in tail, and in default to the use of the daughters in tail, and in default to the use of W. W. Prole, his heirs and assigns. W. W. Prole also assigned to the trustees a policy for 5000*l.* payable in case of his predeceasing his parents, the proceeds to be paid to C. R. Prole for life, remainder as she should appoint, and in default, among the children of the marriage, and in default of children, as she should appoint, and in default to W. W. Prole, &c.

16. "The said Anthony Dickson, after he had approved the said settlement, and before the execution thereof by me, read over to me certain documents which he stated were the settlements he had promised to make. It was, I believe, in the Scotch form, and one of such documents purported to convey and assign the estate of Edrington, and all his the said Anthony Dickson's other property, to the best of my recollection and belief, to the said George Turnbull, since deceased, and the defendant the Rev. George Fulton Knight, upon such trusts as the said Anthony Dickson should direct by instructions to be signed by him; and the other of such documents contained the instructions concerning the said Anthony Dickson's property comprised in the former document, and which instructions directed that the said trustees named in the first-mentioned document should hold the said estate at Edrington, and the said 105,000 sicca rupees in the 5*l.* per cent. India Loan Stock, upon trusts for the benefit of the said Charlotte Ruth Prole for her life, and after her decease for the benefit of me the said William Watson Prole for my life, and after my decease for the benefit of the children of the said intended marriage, subject, nevertheless, as to the said estate of Edrington, to the payment of the sum of 200*l.* a year to the said wife of the said Anthony Dickson for her life; and the said Anthony Dickson also stated with respect to the rest of his property not comprised in the said instructions, that it

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would all belong to the said Charlotte Ruth Prole subject to certain legacies ; and the said last-mentioned documents were duly executed by the said Anthony Dickson, and as I verily believe, in the presence of Colonel Browne, since deceased, and Colonel Baldock, now in Australia ; the said Anthony Dickson stated and represented to me that the said deeds or documents were irrevocable and never could be altered. There were trustees named in them, the property was purported to be conveyed and assigned to them in trust ; George Fulton Knight is to the best of my belief the survivor of the said trustees, and he has declined to take any proceedings as plaintiff.

17. " That I made and afterwards executed my aforesaid settlement of the said estate in Devonshire in consequence of and in reliance on the said promise and agreement and representation of the said Anthony Dickson ; and it was prepared in the belief that the settlement promised by the said Anthony Dickson should be made by him, and it was executed previously and in contemplation of the said marriage, and the said marriage was solemnized in the belief on my part that the said Anthony Dickson had in and by the said documents and deeds in manner aforesaid irrevocably settled both Edrington and the said sum of sicca rupees ; and I believed the aforesaid representations of the said Anthony Dickson to be true, and acted on the faith thereof by marrying, and executing the aforesaid settlement on my part ; the daughter of the said Anthony Dickson also acted and married on the faith thereof."

There was produced from the custody of the defendant Soady, a letter, dated the 5th of April, 1839, from Dr. Dickson to Mr. Turnbull, in the following terms—

" 5th April, 1839.

" My dear Sir,—I now return the two papers, and I hope all is correct, and that no trouble will now be expe-

rienced in administering to my estate. The trust disposition was signed at Pepin's Royal Hotel, Jersey, on the 3rd day of April, 1839, and witnessed by Lieutenant-Colonel Browne, on the retired list of the Bombay Army, and Major Thomas Eales Soady, on the retired list of the Bengal Army, both residing at Jersey. I have now another pleasing information to give you.

"My daughter Charlotte is to be married, about the end of this month, to a gentleman of independent fortune of 1,200*l.* a year and heir to a very fine estate in Devonshire. I, of course, have made suitable settlements, so that my trip to Jersey has been a most fortunate one. We all leave this island about the 24th of the month for France, where we shall probably sojourn for twelve months, so that, should you have occasion to write, it must be done immediately. Compliments to your family.

"A. DICKSON."

Lieutenant-Colonel Baldock, resident in Australia, deposed that he was present at the marriage, and stated as follows:—

4. "That previous to the marriage, Dr. Dickson frequently talked to me on the subject, and I well remember his stating he was about to settle Edrington and other property on his daughter.

5. "That shortly before the marriage took place, Dr. Dickson read to me a deed by which his estate called Edrington, and other property, was settled on his daughter and her children, and he requested me to witness his signature to the same, which I did accordingly.

6. "That I well remember that, by this deed, the estate called Edrington was settled on Dr. Dickson's daughter and her children; and from the conversation which passed between Dr. Dickson and myself on that occasion, and also at other times, both before and subsequently to the marriage, I believe Dr. Dickson did settle irrevocably the property on his daughter and her children."

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Mrs. Baldock, the wife of the above witness, was also present at the marriage, and deposed as follows:—

3. "I remember on several occasions, before the marriage, Dr. Dickson and Mrs. Dickson telling me he intended to settle Edrington and other property on his daughter.

4. "I well remember, shortly before Miss Dickson's marriage, Dr. Dickson asked my husband to witness his signature to the settlement he had made on Charlotte, and my husband afterwards informed me he had witnessed Dr. Dickson's signature to the deed, which he had previously read over to him, by which deed the estate of Edrington and other property was settled on his daughter and her children.

5. "That after the said marriage had been solemnized the said Dr. Dickson told me, in the course of conversation, that he had irrevocably settled Edrington and some rupees on his daughter and her children, and he also said that the rest of his property, with the exception of a few legacies and a certain annual sum to Mrs. Dickson, would go to his said daughter at his death, and to her children."

The defendants subsequently cross-examined Colonel Baldock on his affidavit, but the examiner "certified that he was in too infirm a state of mind to comprehend the evidence written down."

(Signed)

"W. HINDE, Examiner."

Catherine Browne deposed as follows:—

3. "That I perfectly remember, before the said marriage took place, the said Dickson Milliken or Eales Soady told me that the said Anthony Dickson had irrevocably settled his estate at Edrington and other property upon his said daughter C. R. Dickson; and that she, the said D. Milliken or Eales Soady, had seen or read the deed, and that she therefore knew that it was

irrevocable, and that the said Anthony Dickson had told her so."

5. "That it was also generally known and believed that the said Anthony Dickson had made a handsome and final provision for the said Dickson Milliken or Eales Soady on her marriage; but the said Anthony Dickson on various occasions complained to me of the manner in which the said Thomas Eales Soady bargained for his wife, the said Dickson Milliken or Eales Soady, which gave him great displeasure; and it was only at the earnest entreaty and persuasion of his said daughter, C. R. Dickson and Mrs. Dickson, that he overlooked such conduct and agreed to make such provision, as it had given him great displeasure; and I have often endeavoured to reconcile him to the said D. Milliken or Eales Soady and to make them friends."

Elizabeth Jemmerson, a nurse in the Prole family, deposed she heard Dr. Dickson say that he had settled the Edrington estate and his India Loan Stock on his daughter and her husband at their marriage, and that after them it was to be divided between their children—and this was spoken of as a well-known fact.

3. Mary Low, the sister of Mrs. Dickson, deposed:—"I have frequently heard Dr. Dickson and his wife say that he had agreed to settle Edrington and his India Loan Stock on his daughter and her children at her marriage, and that he had settled the same, and that W. W. Prole had settled an estate in Devonshire.

4. "That I perfectly remember, on one occasion in 1847, when on a visit with Dr. and Mrs. Dickson, at Edrington, my sister took from a drawer in the sideboard in the dining-room, where Dr. Dickson kept his important papers, a deed or document, and addressing Dr. Dickson, said, 'What is it? Doctor,' holding it in her hand; she then opened it and read it, and said, 'Doctor, this is the settlement of Edrington which you

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made on Charlotte;' and he replied it was so, and desired her to put it back immediately, which she did.

5. "That in order to enable Dr. Dickson to settle the Edrington estate on his daughter, he had to obtain my sister's consent, as he had promised her the house and gardens at Edrington for her life, which she agreed to give up, on his agreeing to leave a sum of money equivalent to the value of the same."

The evidence of Professor Shankmore showed that, according to the law of Scotland, where a marriage is entered into on the faith of an instrument to make provision for the issue of such marriage, the instrument is irrevocable as to creditors.

There was a draft settlement in 1838, by which Dr. Dickson gave Edrington to his daughter, and made provision for Mrs. Soady, which was subsequently varied in 1839, by striking out Mrs. Soady's name. A settlement was subsequently made by him in 1844, when he gave the Edrington estate to his daughter for life for her separate use, remainder to the heirs of her body.

The defendant's evidence was equally voluminous, and was directed, first, to show that W. Watson Prole was unworthy of credit; secondly, that Dr. Dickson's conduct, in offering Edrington for sale, was inconsistent with there being any settlement made as alleged. Mrs. Soady also in express terms denied that she had ever stated to Mrs. Browne that the testator had settled Edrington on his daughter, or that she had ever had any such conversation with Mrs. Browne on the subject.

Argument.
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Mr. *Greene* and Mr. *Hardy* appeared for the plaintiffs.

[The VICE-CHANCELLOR:—Is it the plaintiffs' case that a settlement was actually executed, or simply that the marriage was solemnized on the representation that Dr. Dickson would settle on his daughter and her children the Edrington estate and the sicca rupees?]

Mr. *Greene*.—The plaintiffs allege, first, that there was, in fact, a settlement executed comprising that property ; but, secondly, if the evidence should fail to establish that point, it proves beyond a doubt that the marriage took place on the representation that such property should be settled by Dr. Dickson on the marriage.

As to the first point, if there was executed a settlement of the Edrington estate and the 105,000 sicca rupees, it was quite clear that, as against the defendants Soady, who were volunteers, the plaintiffs were entitled to a decree for a settlement of that property.

But, secondly, supposing the Court should be of opinion that the evidence, instead of proving a settlement actually executed, disclosed only representations on the faith of which the marriage took effect, the plaintiffs would still be entitled to a decree for a settlement.

In the case of *Hammersley v. De Biel* (a), where a marriage was celebrated on the faith of certain representations, the House of Lords held that it was the duty of a Court of Equity to see that effect was given to such representations. It was contended in this case that there was no evidence of the contents of the settlement, and that therefore the plaintiff's case failed; but it was quite clear no formal contract need be proved: *Luders v. Anstey* (b).

Here it was proved beyond question that Dr. Dickson had represented that he had settled or intended to settle the Edrington estate and the sicca rupees on his daughter and her children, and it was the province of this Court to give effect to those representations.

[The following cases were also cited: *Moore v. Hart* (c), *Gale v. Lindo* (d), *Wankford v. Fotherley* (e),* *Maunsell v.*

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(a) 12 Cl. & Fin. 45, 78, *et seq.*

(d) Id. 475.

(b) 4 Ves. 501.

(e) 2 Vern. 322.

(c) 1 Vern. 110.

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*Hedges White (a), Money v. Jorden (b), Kay v. Crook (c),
Warden v. Jones (d), Bold v. Hutchinson (e).*

Mr. Malins, Mr. Bazalgette, Mr. Hinde Palmer, and
Mr. Beasley (of the common law bar), for the defendants.

The first objection that arises to this suit is, that the bill is filed nearly twenty years after the alleged contract; and if the relief is not barred by the statute, at least the claim is stale.

Again, the evidence wholly fails in establishing the case made by the bill, that a settlement was actually executed; and the defendants are therefore entitled to have the bill dismissed. [The VICE-CHANCELLOR.—As at present advised, I must hold it clearly established that Dr. Dickson represented to the husband that there was to be some settlement, revocable or irrevocable, made upon his daughter.] Supposing, for argument's sake, that Dr. Dickson did promise his daughter to make the alleged settlement upon her, she died in his lifetime; and it was settled that where the person on whom a testator represents he will confer a benefit by will, dies in the testator's lifetime, being other than a child (*i. e.* legitimate child), the gift fails: *Barkworth v. Young (f)*.

So far as the evidence went, it was wholly inconsistent with the plaintiffs' case.

Dr. Dickson's conduct was inconsistent with the plaintiffs' case, because, first, while the marriage was in negotiation he was engaged in settling Edrington; so that, had he then died, it would have devolved on a great nephew. Secondly, in 1839 he entertained a project for the sale of this very estate.

The defendant Prole's conduct was inconsistent, because,

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| (a) 4 Ho. Lds. Cas. 1039. | (d) 2 De G. & J. 76—84. |
| (b) 15 Beav. 372; 2 De G. M. | (e) 20 Beav. 250; 5 De G. M. |
| & G. 318; 5 Ho. Lds. Cas. 185. | & G. 558. |
| (c) 3 Sm. & G. 407. | (f) 4 Drewry, 1. |

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in 1851, when Dr. Dickson threatened to sue him on his bond, he never suggested the pretended settlement. But, in fact, his evidence was essential to patch together the incoherent parts of the case; and the plaintiffs attempted, in this way, to give importance to Dr. Dickson's words, "I have made suitable settlements;" but that expression obviously referred to the settlement of Prole's own estate.

The plaintiffs felt the difficulty of the case of mere representation, and averred that a settlement had been executed; but of the contents of the settlement there was no definite evidence, and the claim was never made till Dr. Dickson was dead and unable to refute it.

The cases cited by the plaintiffs have really little application to that now before the Court. The only one that seemed to have any bearing on the case was *Hammersley v. De Biel*(a); but that was at once distinguishable by the circumstance that, in that case there was an undoubted contract, and the question was as to the effect of it; but here the question that lies at the foundation of the plaintiffs' case is, was there any contract at all?

In *Moore v. Hart*(b), the letter was written to a third person, and what was required was evidence of the contract.

In *Gale v. Lindo*(c), there was a clear contract. In *Jorden v. Money*(d), where the question was, did the obligee of the bond intend to bind himself? the judges, on appeal, differed. In *Warden v. Jones*(e), the question was, was the settlement voluntary? while here the only question was, was there the contract alleged by the bill? In *Bold v. Hutchinson*(f), the Master of the Rolls gave effect to a continuing contract. The only case where the contents of a written document were allowed to be proved

(a) 12 Cl. & Fin. 45.

(b) 1 Vern. 110.

(c) Ibid. 475.

(d) 15 Beav. 372; 2 De G. M. & G. 318; 5 Ho. Lds. Cas. 185.

(e) 2 De G. & Jones, 76—84.

(f) 20 Beav. 250.]

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by parol evidence was *Jameson v. Stein(a)*, but that case was an authority against this bill.

Mr. *Greene* was heard in reply.

The VICE-CHANCELLOR:—

The petitioners are infants. Their bill prays for the assistance of the Court to give effect to a representation alleged to have been made by Anthony Dickson, their maternal grandfather, previously to the marriage of their father and mother, that he had settled upon their mother and her children the Edrington estate and 105,000 sicca rupees.

If the evidence proves with sufficient certainty a representation of this kind, by which the conduct of the contracting parties in the marriage was influenced, the law of this Court, settled in the House of Lords, entitles the petitioners to the relief which they pray.

In the case of *Hammersley v. De Biel(b)* the representation made by the father of the wife was merely of an intention to make a further provision for his daughter and her children of 10,000*l.* on his death. There was no more than the expression of an intention to leave this sum by a revocable instrument. But inasmuch as the expression of that intention, on such an occasion, had an influence on the conduct of the contracting parties, and was an inducement to the contract, the House of Lords affirmed the decision of the Court of Chancery, and compelled the executors of him who had made the representation to pay the money and to fulfil that which was expressed as a mere intention. This doctrine, which gives all the force of a binding contract to the mere expression of an intention to do something by an instrument revocable in its nature, is too firmly established to be shaken. It has been acted upon in this Court from an

(a) 21 Beav. 5.

(b) 12 Cl. & Fin. 45.

early period. In the case of *Hammersley v. De Biel* (a), when the House of Lords confirmed the doctrine, it was there stated in the following terms:—"The principle of law, at least of equity, is this—that if a party holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and the other party consents and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a court of equity will take care that he is not disappointed, but will give effect to the proposal. It is impossible to say for a moment that it was not held out to the Baron de Biel as a part of this arrangement, that 10,000*l.* should be left by will for the purpose of being settled upon the children of this marriage. It is impossible to suppose for a moment that that did not operate upon the mind of the Baron, and induce him, with reference to the other provisions contained in this instrument, to celebrate the marriage; and I am sure, under these circumstances, your lordships will see the propriety and equity of giving effect to those representations."

Lord Cottenham, when the same case was before him in the Court of Chancery, notices that in the case of *Luders v. Anstey* (b) a mere suggestion for consideration, followed by marriage, was held to be binding. And, speaking of the general doctrine, he said—"If it be supposed to be necessary for this purpose to find a contract such as usually accompanies transactions of importance in the pecuniary affairs of mankind, there may not be found in the memorandum or in the other evidence in the cause proof of any such contract. When the authorities on this subject are attended to, it will be found that no such formal contract is required. A representation made by one party for the purpose of influencing the conduct of the other party, and acted on

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(a) 12 Cl. & Fin. 78, 79.

(b) 4 Ves. 50.

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by him, will in general be sufficient to entitle him to the assistance of this Court for the purpose of realising such representation (a)."

The present case cannot be brought within the application of the principle unless there be clear proof of the representation actually made, and made under circumstances to show that it influenced the conduct of the contracting parties. There must also be reasonable certainty as to the amount and nature of the property to which the representation applied.

The difficulty of the case is upon the evidence. If the testimony of Wm. Watson Prole, the husband, could be received as above all exception, there could not be much doubt. But most of the comments made on his statements and his conduct are so far well founded, that, unless where his evidence is confirmed by other unexceptionable testimony, it cannot have much weight. In his first affidavit (par. 9 to par. 17) he distinctly states the representation made to himself and others by Dr. Dickson, that the Edrington estate and 105,000 sicca rupees were to be settled so as on his death to be a provision for his daughter and her children, with a life estate to Wm. Watson Prole himself. He also states that afterwards, and before the marriage, Dr. Dickson read over to him certain documents in the Scotch form, purporting to settle the Edrington estate and the 105,000 sicca rupees.

In confirmation of this statement there is very remarkable evidence of various kinds, partly documentary, but principally by persons who speak to declarations and representations by Dr. Dickson himself. The documentary evidence is found first in the letter of Dr. Dickson to Wm. Prole, the father of the intended husband, dated the 22d of March, 1839, a few weeks before the marriage, in which he says, speaking of the marriage and of his daughter—"She will have no fortune

(a) 12 Cl. & Fin. 62 (note).

till my death, which will then be considerable." Again, writing on the 5th of April, 1839, to Mr. George Turnbull, his law agent in Edinburgh, and informing him that his daughter was about to be married, he says, "I, of course, have made suitable settlements." Colonel Baldock and Mrs. Baldock prove that, before the marriage and in contemplation of it, Dr. Dickson declared to them that he intended to settle the Edrington estate and other property on his daughter and her children. Colonel Baldock swears that before the marriage he was asked by Dr. Dickson to attest, and he did attest, the execution of an instrument which Dr. Dickson read to him, and represented to be a settlement of the Edrington estate and other property on his daughter and her children. Mrs. Baldock swears that on several occasions before the marriage Dr. Dickson declared this intention, and after the marriage he told her that he had irrevocably settled the Edrington estate and some rupees on his daughter and her children. The weight of Colonel Baldock's evidence does not seem to be in any material degree affected by what took place on his cross-examination. The defendants did not venture to cross-examine Mrs. Baldock, and her evidence seems above all suspicion. Mrs. Catherine Brown was well acquainted with Dr. Dickson and his reputed daughter, Mrs. Prole, and with the defendant Mrs. Soady. She proves that she was present at the marriage, and says she perfectly remembers that before the marriage the defendant, Mrs. Soady, told her that Dr. Dickson had "irrevocably settled the Edrington estate and other property on Mrs. Prole. She also says that it was well known, and believed generally among the friends of Dr. Dickson, at the time that he had made this settlement." This witness was not cross-examined.

This distinct testimony to a declaration by the defendant, Mrs. Soady, herself, is positively denied by Mrs. Soady. If it had been admitted, the admission would have been almost fatal to Mrs. Soady's case. Mrs.

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Catherine Browne, who swears to the declaration, seems to be a wholly disinterested witness, and no attempt is made to shake her evidence by cross-examination. The denial by Mrs. Soady is made under the bias of the strongest interest, and there is one statement in her answer of an unscrupulous kind, which seems to be irreconcilable with other unexceptionable evidence—namely, her belief that Dr. Dickson did not write or send to Wm. Prole the letter of the 22d of March, 1839; and her statement that this belief is founded on evidence supplied by Wm. Watson Prole himself, and other circumstances which she and her husband say have come to their knowledge.

On the balance of evidence, there is greater weight in the disinterested evidence of Mrs. Catherine Browne than in the denial of Mrs. Soady. But the case is not to be disposed of on the conflict of testimony between these two persons. Mrs. Mary Low is the sister of the lady who was Dr. Dickson's second wife, and often visited them. She proves frequent declarations, both by Dr. Dickson and his wife, that, on the marriage, he had agreed to settle Edrington and his India stock on his daughter and her children. Her evidence as to a document produced in her presence in 1847, which Dr. Dickson said was the settlement of Edrington, and which, in her re-examination, she says Dr. Dickson, in reply to some observation, said was the settlement on his daughter's marriage, on her and her children of Edrington and his India stock, amounts to a declaration by him of the existence of a settlement which in a general way seems to answer the description of that which Colonel Baldock proves he was called upon to attest previous to the marriage. Thus far there is the confirmatory evidence of four witnesses of unimpeachable credit, three of whom prove representations made before the marriage, and the other speaks to subsequent declarations. Besides these, Elizabeth Jemerson, the nurse, speaks to declarations by Dr. Dickson, not made to herself, but in her presence,

that the Edrington estate and his India stock were settled on Mrs. Prole and her children. The evidence of the elder Prole and Mrs. Rebecca Prole to the same effect, is clear and circumstantial, nor is it shaken by the cross-examination. Perfect certainty as to the nature and amount of the property to which the representations apply is essential in a case of this kind. The expression "his India stock," it is admitted, applies only to the 105,000 sicca rupees. There is the difficulty in the plaintiff's case, that although William Watson Prole clearly states that the Edrington estates and 105,000 sicca rupees were represented as the subject of settlement, the three confirmatory witnesses as to what was represented before the marriage, speak of the Edrington estate and other property but do not specifically mention the 105,000 sicca rupees. Where the question is as to the strength of confirmatory evidence in a case of this kind, there seems sufficient force in the concurring testimony of four credible witnesses, of subsequent declarations by Dr. Dickson himself that the 105,000 sicca rupees, or, in other words, his India stock, constituted the other property described in general terms by the other witnesses. All this seems too strong to justify the Court in rejecting the positive statement of William Watson Prole, that the subject matter of the representation was the Edrington estate and the 105,000 sicca rupees. But the confirmation of his statement, that he was himself to have a life estate, is defective. It is only to be found in the evidence of his father and mother and Jemmerson in her affidavit, and she in her cross-examination does not mention it. Not one of the other witnesses supports his evidence on this point; and as he speaks to it himself under the bias of a strong and direct interest, I do not feel satisfied upon it, and cannot consider that he has established any right to the assistance of the Court to secure a life estate for himself.

It is necessary now to consider what is adduced by the defendants to contradict the plaintiffs' case. The defence

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of Mr. and Mrs. Soady consists in the positive denial of the plaintiffs' case, and in the proof of various circumstances in the conduct of William Watson Prole and of Dr. Dickson to show the improbability of the alleged representations having ever been made or relied on by William Watson Prole. But none of these circumstances are of a decisive kind. Their principal value to the defendants is the discredit which they tend to throw on the character and conduct of William Watson Prole. The clear evidence that in August, 1839, only a few months after the marriage, Dr. Dickson entertained a proposal for the sale of the Edrington estate, is no doubt inconsistent with the fact of his having agreed before the marriage to settle it on his daughter and her children. So also is the fact of his borrowing money on the security of that estate in order to accommodate William Watson Prole.

But in cases of this kind similar inconsistencies have occurred. In *Hammersley v. De Biel*, the father, after making that representation, which was decided to bind him, considered himself entitled to deal with his property as if he was not bound by any obligation which affected it. Moreover, if Dr. Dickson did before the marriage execute such an instrument as he represented to Colonel Baldock and others, it was revocable in its nature. In cases of this class it is the law of the Court which makes irrevocable the obligation incurred by the representation as to the settlement of the property by an instrument of a revocable kind. According to the defendant's own evidence, there was at the time of the marriage an existing testamentary settlement of the Edrington estate and other property, which would include the 105,000 sicca rupees, in favour of the lady. Therefore, whatever weight may be due to the facts of the proposal for sale of the estate, and the mortgage debt on it, these must be taken with the qualification that there was some existing settlement at the time.

The argument founded on the character and conduct of William Watson Prole, to show the probability of his having married without any definite agreement or understanding as to a settlement by Dr. Dickson, is not only inconclusive, but the circumstances tend strongly to a contrary impression. He was well aware that the lady was a natural child, and if, as the defendants assert, he did not make any proposal to marry her till he had well ascertained the nature and amount of Dr. Dickson's property, it follows that he must have known that without a settlement he could get none of that property; and there seems very little probability that he would marry her without relying on some distinct arrangement or understanding as to a provision for her and her children on the part of Dr. Dickson. In the various letters of William Watson Prole to Dr. Dickson and Mr. Turnbull, the fair interpretation of his language, loose and inaccurate as it is, seems in favour of his always representing that he had married in the reliance on a provision for his wife and children by a will or instrument made at that time. Immediately after Dr. Dickson's death, in the letter to Turnbull, dated 7th January, 1856, he says:—"It is Dr. Dickson's settlement or will, made in January at the time of my marriage, that I wish to have a copy of. This deed he read over to me and my late wife, and it was witnessed by several friends there present."

Some confusion occurred during the argument, from the use of the word "settlement." In this case it is used in the Scotch sense. The trust disposition and settlement, with the relative letter of instructions, constitute, as to the objects of the gifts, an instrument of a testamentary and ambulatory character. The evidence of the Scotch law, especially as stated in the affidavit of Professor Shank More, shows that, according to the law of Scotland, which must govern as to the Edrington estate, where a marriage is entered into on the faith of a contract to make a pro-

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vision, the instrument has an irrevocable character, except as to creditors.

One of several extraordinary circumstances in the present case, is, the total want of evidence as to the contents or effect of the document which was sent by Mr. Dickson to Mr. George Turnbull, enclosed in his letter of the 5th of April, 1839. It is no less extraordinary that there is a similar want of evidence as to the contents of the sealed parcel forwarded by Mr. Chapman to Mr. George Turnbull, as stated in his letter of the 31st of May, 1839. As to the document enclosed in Dr. Dickson's letter of the 5th of April, 1839, the date of 6th of February, which is ascribed to it by Mr. Turnbull in his letter of the 13th of April, 1839, and the names of the witnesses, seem inconsistent with the notion that it was the instrument read to Colonel Baldock and attested by him. But it is difficult to adopt the defendants' argument, that it was an executed copy of a letter of instructions exactly following the terms of that which was forwarded to Dr. Dickson by Turnbull, subjoined to his letter of the 28th of January, 1839, inasmuch as Dr. Dickson says in the letter which enclosed it, speaking of his daughter's marriage, "I, of course, have made suitable settlements"—a statement irreconcilable with his giving the whole of his property according to the draft which had been forwarded in January, 1839, by Mr. Turnbull.

The main purpose of the new letter of instructions in the form transmitted by Turnbull in January, 1839, was to strike out Mrs. Soady, in consequence of the provision which he had made for her at her marriage. The draft contains no recital of any reason for altering the settlement of 1838, which gave the Edrington estate to his reputed daughter, as the first object of his bounty; and the draft, after making that alteration, confirmed the rest of the settlement of 1838, leaving the general residue of his property to her.

Whatever were the terms of the letter of instructions forwarded on the 5th of April, 1839, it is a certain fact, and one of great importance, as bearing upon the rest of the evidence, that the first alteration in this letter of instructions, made after the marriage, was in 1844, when he gave the Edrington estate to his daughter, Mrs. Prole, and the heirs of her body, as the first objects of his bounty. By this settlement of 1844 he expressly provided that the life estate of his daughter should be to her sole and separate use. At that time, in 1844, there appears no reason why his daughter should have had more strong claims on his bounty than at the time of her marriage. But the demands for loans of money made upon him by her husband may very well account for his desire to secure the estate for her own separate use. According to the evidence, unless such an instrument was executed by Dr. Dickson on the occasion of the marriage as that which was read to Colonel Baldock and attested by him, it is not proved by any sufficient evidence that the settlement of 1838 of the Edrington estate on his daughter and the heirs of her body, together with the residuary gift to her, was ever revoked or altered till 1844, when it was altered merely by giving it to her sole and separate use for her life, and then to the heirs of her body. All these observations are only of importance as applying to the case which is set up by the defendants.

It is impossible not to feel the danger of deciding a question of this kind on secondary and circumstantial evidence. But where, on a full and fair investigation, there is the concurring testimony of so many witnesses, unless it is to be decided that parol evidence is not admissible, it is the duty of the Court to yield to that weight of evidence which effectually confirms general statements in writing and forces conviction. There is here such a mass of confirmatory evidence that I can come to no other conclusion than that Dr. Dickson did represent to William Watson Prole and

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to other persons, previously to and in contemplation of the marriage, that the Edrington estate and 105,000 sicca rupees were settled by him as a provision for his daughter and her children, and that the marriage was contracted in a confidence in that representation. Every part of the evidence has been laboriously examined and sifted and commented upon during the many days occupied in the discussion. My wish was that the question of fact, whether the marriage was contracted on the faith of the alleged representation, should be tried by a jury, on an issue to be directed by this Court: but the earnest wish of the parties, and a sense of the heavy expense which the trial of an issue would have occasioned, induced me not to shrink from the labour and responsibility of endeavouring, on a full investigation of the evidence, to arrive at a conclusion satisfactory to my own conscience. The conclusion at which I have arrived is, that Dr. Anthony Dickson did represent to Mr. William Watson Prole and others, previously to and in contemplation of the marriage, that the Edrington estate and 105,000 sicca rupees would, upon his death, become the property of his reputed daughter and her children.

Upon this result the plaintiffs are (according to what I understand to be the settled law) entitled to the assistance of this Court, to have that representation made good as against the assets of Dr. Anthony Dickson.

The right of the plaintiffs must prevail over all those who claim as volunteers under his will, but is subject to the claims of Dr. Dickson's creditors. As the plaintiffs are legatees under the will, a question of election arises. Their rights, as asserted by this bill, must be established by a declaration of the Court, that, pursuant to the representation made by the testator upon the marriage of their parents, the plaintiffs, as the only children of the daughter, are entitled to 105,000 sicca rupees and the Edrington estate, as tenants in common, absolutely.

It must be referred to the chief clerk to inquire and certify whether it is for the benefit of the plaintiffs to elect to take the 105,000 sicca rupees and the Edrington estate pursuant to this declaration, or to take the benefits given to them by the will as legatees.

As to the costs of the suit up to and including the decree, the circumstances of the case are so extraordinary that it seems to me there should be no costs on either side.

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IN THE MATTER OF THE DEVISEES OF
NICHOLAS BROOKING v. THE SOUTH
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December 9th.

THIS was a petition for payment out of court of money paid in by a railway company.

Nicholas Brooking, deceased, the testator, devised certain lands in the parishes of Ipplepen Marlden, and St. Pepon Devon, to the Rev. John Charter, and R. Holdsworth, upon trust, *inter alia*, in the events which have happened for the testator Nicholas Brooking, the elder, for life, remainder to the trustees to support contingent remainders, with remainder to the use of the first son of the body of Nicholas Brooking in tail with divers remainders, &c.

A disentailing assurance necessary to enable a landowner to obtain the purchase-moneys of land taken by a company and paid into Court—*Held*, to be "costs in consequence of the purchase," and payable by the company.

The petitioner, Nicholas Brooking, the younger, was the eldest son of Nicholas Brooking the elder, and tenant in tail under the will of the testator. He attained twenty-one on the 20th of July, 1858.

The South Devon Railway Company were incorporated

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under their Act dated 1844, whereby they were authorized under their compulsory powers to take portions of the lands devised by the testator, the values of which were ascertained to be 330*l.*, and which the company on entering on the land paid into court. By a deed poll dated the 20th of December, 1856, Nicholas Brooking, the elder, conveyed the land which they had taken to the railway company.

By a deed dated the 9th of November, 1858, between Nicholas Brooking, the younger, of the first part (the tenant in tail), and Nicholas Brooking, the elder, of the second part (protector of the settlement), and R. T. Head of the third part, Nicholas Brooking, the younger, with the consent of Nicholas Brooking the elder, granted and conveyed to Thomas Head all the said messuages, tenements, bartons, farms, lands, hereditaments, and premises contained in the underwritten schedule, including the pieces of land sold to the company, and all other real estate comprised in and devised by the testator, to hold the same to R. T. Head, and his heirs and assigns, to the use of Nicholas Brooking, the younger, his heirs and assigns for ever.

A petition was presented by the persons entitled under the testator's will for payment out of court of the sum of the 330*l.*, but on the company's objection, a new deed was executed, disentailing the 330*l.* as money and not as land taken by the company.

The question now raised was, whether the said disentailing assurance was an expense "in consequence of the company having taken the land."

Argument.

Mr. *Karslake*, for the petitioner, contended that the expense of and incident to the disentailing assurance was strictly within the meaning of the statute. In *Ex parte Marshall(a)*, on the construction of words nearly

(a) 1 Phil. 560; 4 R. C. 58.

identical (a) the Court held the company must pay the costs of obtaining payment of the money out of court.

Mr. *Chapman Barber* contended that, as the costs of the disentailing deed as to the purchase-money had become necessary from the error of the landowner, the company ought not to be charged.

The VICE-CHANCELLOR:—

Any assurance made necessary by the company's taking the land in order to enable the landowner to have the full benefit of the land or of the money which represents it, is necessary in consequence of the company taking the land, and must therefore be paid for by the company.

(a) The Act 5 & 6 Will. 4, c. cviii., provides that "It shall be lawful for the Court to order all reasonable costs, charges, and expenses attending such purchase, taking, or using of any lands, tenements or hereditaments, or which may be incurred in consequence thereof."

The petition was presented by a tenant in tail for getting the money out of court.

NOTE.—The 156th section of the Act (7 & 8 Vict. c. lxviii.) is as follows: "With respect to the costs of the conveyance of any such lands purchased or taken by the company, all such costs shall be borne by the company, and such costs shall include all charges and expenses incurred on the part, as well of the seller as of the purchaser, of all conveyances and assurances of any such lands, and

The Lord Chancellor said, "The case comes within the express terms of the Act, which are very general, and that construction is consistent with the justice of the case, for, where a public company takes a person's land without his consent for their own purposes, it is right they should pay all the expenses incident to it."

of any outstanding terms or interest or interests therein, and of deducing, evidencing and verifying the title to such lands, terms or interests, and of making out and furnishing such abstracts and attested copies as the company may require, and all other expenses incident to the investigation, deduction and verification of such title."

Section 173 is as follows: "And

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with respect to costs in cases of monies deposited in the Bank of England, be it enacted, That the Court of Chancery may in all such cases, except where monies shall have been so deposited by reason of the wilful refusal of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, on the failure or neglect of any party to make a good title to the land required, order the costs of the following matters including therein all reasonable charges and expenses incident thereto to be paid by the company; (that is to say,) the costs of the purchase, or of the taking or using of the lands, or which shall have been incurred in consequence thereof, other than such costs as are therein otherwise provided for, and the costs of the in-

vestment of such monies in government or real securities and of the reinvestment thereof, or of the government or real securities purchased therewith, in the purchase of other lands, and also the costs of obtaining the proper order for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the government or real securities upon which such monies shall be invested, and for the payment out of court of the principal of such monies, or of the government or real securities wherein the same shall be invested, and of all other proceedings relating thereto, except such as are occasioned by litigation between adverse claimants."

This clause is nearly in the same words as the 80th section of the Lands Clauses Consolidation Act.

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Feb. 10th.

ON the 11th of June, 1859, the following agreement was entered into between the petitioner, Ann Cass, and William Philp:—

“ In consideration of your employing me in your law matters, I hereby undertake to charge you the money (cash) only actually out of pocket, in all matters in which I may be engaged or concerned for you.”

Mr. Philp was accordingly employed, and received, according to Mrs. Cass's statement, 216*l.* 8*s.* In October, 1859, Mr. Philp, in pursuance of a notice previously given, wrote to the petitioner as follows:—

“ I return you the original affidavit, which I refuse to file, or to attend the summons to-morrow, or in any way to act further as your solicitor, and of which I have before given you ample notice, you having neglected to send me the amount required by me in my former letter to you.”

Mr. Philp having refused to deliver up the documents, Ann Cass presented a petition, asking that Mr. Philp should be directed to deliver up the documents in his possession, to deliver his bill of costs against the petitioner and her son, and that such bills, when delivered, might be referred to the Taxing Master for taxation, having regard to the undertaking of the 11th of June, 1859, and to the understanding with the petitioner and her said son; or that the bills might be ordered to be taxed on the terms of the undertaking, the petitioner offering to pay what might be found due.

Under the common order to tax, the Taxing Master will have regard to an agreement by the solicitor to charge only costs out of pocket.
Certificate of practice by Taxing Master.

Mr. *Lovell* appeared for the petitioner.

Argument.

Mr. *Malins* and Mr. *Welford* contended that the petition

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was improper, as the petitioner might have obtained the common order to tax as of course.

The VICE-CHANCELLOR said that the question must be decided according to the practice in the Taxing Master's office, and directed the Taxing Master to certify the practice.

The certificate of Master Follett was as follows:—

“ Under the common order, the Taxing Masters would not hesitate to entertain the question of an agreement by the solicitor to take only costs out of pocket. Agreements for the conduct of business, and the terms of conducting it, are of constant occurrence between the solicitor and his client, and the Taxing Masters could not discharge their business without great injustice and impropriety, if they declined to listen to such arrangements, and to give the proper effect to them.

“ As regards the present question, however, whether a client may properly present a special petition in order to give effect to such an agreement to take only costs out of pocket, the Taxing Masters would submit that, as the decisions now stand, it would not be right to make him pay the costs of the application.

“ If he obtained only the common order, and the Taxing-Master gave effect to it, the propriety of the Master's decision, and also his right to assume the jurisdiction to decide, would be tested by an exception; and if the Court should entertain a different opinion of the jurisdiction, the client would then be in the position of being bound to pay a full bill of costs, to which, in fact, he was not justly and legally liable. It would seem, therefore, to be hard upon him to insist on his running this risk until the point has been properly decided.

“ No case is known in which an exception to such decision of the Taxing Master has been brought before the Court.

“ On the contrary, in two cases before the Master of the

Rolls, *Re Ransom*(a), *Re Gedye*(b), his Honour has made orders for the taxation of the bills, having regard to the agreement, the order being on special application, and the question as to an order of course being sufficient appearing not to have been considered."—*Feb. 10th, 1860.*

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See also *Colegrave v. Manley*(c); *Lord v. Wormleighton*(d); *Heslop v. Metcalf*(e); *Wilson v. Emmett*(f); *Re Eyre*(g); *Ex parte Foley*(h); *Re Lewin*(i).

The VICE-CHANCELLOR, upon this certificate, made the common order to tax, having regard to the agreement between the parties mentioned in the petition.

Judgment.

SLIM v. CROUCHER.

Jan. 24th.

THE bill, in this case, prayed that it might be declared that the plaintiff was induced to lend to Thomas Hudson, the defendant, sums of money amounting to 300*l.*, by the fraud, misrepresentation and concealment of the defendants, John Thomas Croucher and Thomas Hudson, and that the defendants and each of them might be decreed to repay to the plaintiff the said monies, with interest from the date of the said advances.

On a proposal to borrow money on the security of a lease, which the borrower said he was entitled to have granted to him, the lender, on the assurance of a letter addressed to

In December, 1856, Hudson applied to Messrs.

his solicitor by the defendant, saying that he was ready to grant the lease, advanced his money on the security of the lease; but it appearing that the lessor had previously granted a lease to another person, the Court ordered the lessor to repay the monies, although there was no evidence of deliberate fraud, his defence being that he had forgotten the previous lease.

(a) 18 Beav. 220.

(f) 19 Beav. 233.

(b) 23 Beav. 347.

(g) 10 Beav. 569; s. c. 2 Phill.

(c) Turner & Russ. 400.

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(d) Jac. 580.

(h) 11 Beav. 456.

(e) 3 M & Cr. 183.

(i) 16 Beav. 608.

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Norton, the plaintiff's solicitors, and requested to know if they had any client who would lend the money on the security of certain houses in Croucher Place, Middlesex, representing at the same time that he was entitled to a lease of the said houses, from the defendant Croucher, at a peppercorn rent. Messrs. Norton communicated this proposal to the plaintiff, who agreed to lend Hudson 300*l.*, on the security of the said houses, if the defendant Croucher would undertake to grant a lease of the said houses to Hudson, at a peppercorn rent. The defendant Hudson obtained Croucher's assurance that he would grant the lease, and Croucher also wrote and sent by Hudson the following letter to the plaintiff's solicitor, Mr. Norton.

" Post Office, Shadwell, December 7, 1856.

Sir,— " I am quite agreeable to grant a peppercorn lease of ground on which four houses are erected and situated at Bromley, to Mr. Hudson.

" I am, Sir,

" Yours, &c., &c.,

" J. T. CROUCHER.

" — Norton, Esq."

On the 19th of January, 1857, Croucher executed to Hudson two leases of the houses for ninety-eight years and a half, from Christmas, 1853.

The bill averred that, in further pursuance of the agreement, and on the faith thereof, and on the faith of the said leases, and in particular on the faith of the said assurance by Croucher that he would grant the said leases, the plaintiff, between the 19th of January, 1857, and the 2d of May, 1857, advanced to Hudson various sums amounting to 300*l.* And on the 2d of May, 1857, Hudson executed and handed over to the plaintiff a deed of the same date, which purported to be a mortgage of the underlease from Croucher to Hudson, to secure 300*l.*, and interest.

In August, 1857, Hudson left England, as was alleged, to avoid his creditors, and was now out of the jurisdiction of the Court.

The plaintiff subsequently ascertained that, in August, 1856, Croucher had granted to Hudson the land on which the houses in question had been built, including all the premises in the lease of the 19th of January, 1856, which lease was still operative, and had been assigned by Hudson to a stranger.

The bill alleged that the plaintiff lent the 300*l.* to Hudson on the faith that Croucher could and would grant to Hudson the lease of the ground on which four houses were erected, and that Hudson could and would grant to the plaintiff a valid security of the said houses, for all the residue of the said term of years, by means of the said underlease.

That, before the leases were executed, Croucher was informed by Hudson, and also by Messrs. Norton, and well knew, that the plaintiff was about to lend the 300*l.* on the security of the said leases, and that he would not make the said advance without the assurance of Croucher was obtained that he would grant the said leases.

The bill alleged further, that, under the circumstances aforesaid, the plaintiff was induced to lend the said 300*l.* by fraud, misrepresentation, and concealment on the part of Croucher and Hudson. That Croucher knew that Hudson was desirous of obtaining the leases of the 19th of January, 1857, in order to raise money upon them, and, as owner thereof, was about to obtain a loan on the security of the said lease, and that Croucher aided Hudson in misleading and deceiving the plaintiff, and thereby enabling Hudson to obtain the plaintiff's money.

Under the circumstances aforesaid, the bill charged that Croucher was bound to make good the sum of 300*l.* with interest, and to pay the costs of the suit.

Evidence was adduced on the part of Croucher, to

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show that he had forgotten the existence of the first lease, and had inadvertently granted the second.

Mr. *Malins*, and Mr. *G. L. Russell*, for the plaintiff.—This case is not distinguishable in principle from the case of *Burrowes v. Lock* (a). In that case, the plaintiff was about to deal with one Cartright, and applied to his trustee, Lock, who was the person best qualified to give the required information, and was informed by Lock that Cartright was entitled to 288*l.*, and had an undoubted right to assign that sum—knowing that Cartright had no right to make such assignment, having previously agreed to give another person 10*l.* per cent. out of the fund. On a bill filed against Lock, who alleged he had forgotten the circumstance of the first grant, the Court held he was bound to indemnify the plaintiff (b). It was impossible to distinguish the two cases.

[*Partridge v. Usborne* (c), was also cited.]

Mr. *W. D. Lewis* and Mr. *Surrage*, for the defendant, Croucher.—It was proved that the representation complained of, was and must have been the result of mistake, as there was no assignable motive for the defendant to deceive the plaintiff. If no case of fraud or gross negligence was proved, the plaintiff's case failed: *Evans v. Bicknell* (d). In that case, Lord Eldon said "Where there was mere negligence (as in this case), though it may have very mischievous consequences, the Court has not charged the party, unless it has been so gross as to amount to evidence of fraud" (e).

The defendant was under no obligation to satisfy the plaintiff; there was no fiduciary relation between the par-

(a) 10 Ves. 470.

(b) *Ibid.* 475.

(c) 5 Russ. 195.

(d) 6 Ves. 174.

(e) *Ibid.* 191.

ties, and the plaintiff, if he wished to be secure, ought to have searched the Middlesex Registry.

Unless fraud was proved, which it clearly was not, this was really a bill for a money demand, and was the subject of an action, and, as such, could not be sustained in this Court: *Sainsbury v. Jones (a)*; *Clifford v. Brooke (b)*.

[On the question of pleading, *Ellis v. Colman (c)*, was cited.]

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—
Argument.

The VICE-CHANCELLOR:—

This bill is filed, not for any breach of contract, but in order to compel the defendant Croucher to make good to the plaintiff, money which, by the *suppressio veri* and *suggestio falsi* of Croucher, the plaintiff was induced to lend to Hudson.

Judgment.
—

It is shown by the evidence that Croucher knew that the object of Hudson, in applying for the lease, was to obtain a loan from the plaintiff.

The conduct of Croucher in affecting to grant a lease of certain houses, which he knew was to become the plaintiff's security, and of which he had previously granted a lease, which he must have known was still valid and effectual, was highly improper. He says that he had forgotten the former demise, and was, therefore, in the full belief that the property was still vested in him. But, even supposing that case made out by the evidence, it is no defence to this suit. It was clearly a misrepresentation on his part, that he was in possession of the property, and he must be held to have known that the plaintiff was lending his money upon an illusory grant.

This case is within the recognised doctrine of this

(a) 2 Beav. 462; s. c. on appeal, 5 M. & C. 1.

(b) 13 Ves. 131.

(c) 25 Beav. 662.

1880.
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Court, and the plaintiff is entitled to a decree against Croucher, in the terms of the prayer of the bill, with costs. The money must be paid within one month after service of the decree.

Re THE WINDING-UP ACTS, 1848-9, AND THE
 ROYAL BANK OF AUSTRALIA: *Ex Parte*
 FOREST.

Feb. 15th.

The order to wind up a Joint Stock Company under the Acts of 1848-9, does not suspend the operation of the Statute of Limitations.

The orders for fixing a time under the 84th section of the 19 & 20 Vict. c. 47, within which claims must be preferred, are applicable to cases under the Winding-up Acts of 1848-9.

Seemle, there is no analogy between the administration of assets in bankruptcy and under the Winding-up Acts, on the question as to the Statute of Limitations.

THIS was a motion to discharge an order of Master Richards, made on behalf of Robert Forest, who claimed to be the holder of a debenture or promissory note for 200*l.*, dated the 19th of February, 1845, payable the 19th of February, 1850, signed by four of the directors, and countersigned by Thomas Higgins, the secretary, and of three coupons of the same date for 5*l.* each, and payable respectively on the 19th of February, 1849, the 19th of August, 1849, and the 19th of February, 1850. The interest was paid up to the 19th of August, 1848.

The order complained of was that the claimant was not entitled to prove as a creditor against the assets of the company, on the ground that the claim was barred by the Statute of Limitations, the company having been ordered to be wound up in 1850. Very large sums were collected by calls from the shareholders, and large sums paid for debts; and the affairs all wound up except one case, *Re Drummond*, which was on appeal; 15*l.* a share had been repaid to the contributories.

In February, 1858, a notice was published under the 84th section of the 19 & 20 Vic. c. 47, calling

on all claimants to come in within a limited time and prove their debts, on penalty of being excluded, but no claim was made by these creditors under such notice.

Mr. Forest, in his affidavit, stated that he had received this debenture in 1846, four years before it was due.

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Ex parte
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Mr. Greene and Mr. Karlake, for the motion.

A commission in bankruptcy is a trust for the benefit of all the creditors; and it is admitted that the Statute of Limitations does not operate against a trust: *Ex parte Ross and Hooper*(a). As soon as a debt was proved under a commission, the Statute ceased to affect it: *Ex parte Healey*(b). But the analogy between a commission in bankruptcy, and proceedings under the Winding-up Acts was complete, for the claims were to be proved exactly as in cases of bankruptcy: 11 & 12 Vict. c. 45, section 74(c).

Argument.

On the same principle, the winding-up order creates a trust in the official manager for the benefit of all the creditors. In *Wryghte's case* (d), the debt accrued on the 24th of November, 1845. On the 12th of February the claim was carried in, and the 18th of December, 1851, being appointed for the proof of the claims, and Mr. Wryghte not appearing, the Master disallowed the claim; but that order was reversed on appeal by the Vice-Chancellor. At that time, six clear years had elapsed,

(a) 2 Gl. & J. 46; on appeal, *Ibid.* 330.

(b) 1 Deac. & C. 361—9.

(c) "And be it enacted that the creditors of the company, making proof of their respective debts or demands before the Master of the Rolls, make proof thereof by deposition or affidavit, in the same manner in all respects as debts

are now allowed to be proved in bankruptcy: provided, nevertheless, that it shall be lawful for the Master to allow or direct the proof of such debts or demands, or any of them, to be made by the official manager or by the creditors, in such other form or manner as he shall think fit."

(d) 2 De G. & S. 244.

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and the only thing to take the case out of the Statute was the proceeding under the Winding-up Act. [The VICE-CHANCELLOR:—You must show that the assets are impressed with a trust for your benefit.] So long as the manager is in possession of assets, he holds them for the benefit of the creditors. Whatever doubt there might be under the former Acts, the 84th section of the Act of 1856 (a), empowered the Court, pending a winding-up, to restrain proceedings against a company—thus completing the analogy between winding-up and bankruptcy. In *Re Dover and Deal Railway Company* (b), it was held that the Court had no jurisdiction to restrain creditors of a Joint Stock Company from suing the members, pending the winding-up; but now, that the Court was vested with power to stay proceedings at law, it followed as a necessary consequence, that the creditors were entitled to require the official manager to look after their interests, and to be their trustee. If so, the Statute of Limitations would not apply.

Mr. *Malins* and Mr. *Roxburgh* appeared for the official manager, but were not heard.

Judgment.

The VICE-CHANCELLOR:—

This creditor's right against the company accrued in February, 1850, now nearly ten years ago; and within a few months after the debt became due, an order was made

(a) 19 & 20 Vict. c. 47, sect. lxxxiv.: "The Court may at any time after the presentation of a petition for winding up a company, and either before or after making an order for winding up the same, upon the application by motion of any creditor or contributory of such company, restrain further proceedings in any action or suit against the company, or appoint

a receiver of the estate and effects of the company. It may also, by notice or advertisement, require all creditors to present and prove their claims within a certain time, or be precluded from the benefit of any distribution which may be made before such claim is proved."

(b) 17 Sim. 18.

to wind up the company. Advertisements for creditors were published immediately afterwards, in the form which is prescribed in the Winding-up Act of 1848. That Act unfortunately does not limit any time within which a claimant must prove his debt. But, though no time is fixed in the form, the whole scope and object of the Act is to do justice between the contributories and the creditors of the company as speedily as possible.

It has been contended that the official manager is a trustee of the assets for the benefit of all the creditors, and that, therefore, the lapse of more than six years between the accruing of the debt and the demand for payment, is no bar to the claim, which, it is said, is that of a *cestui que trust* against a trustee; and to support this view, reference has been made to cases in bankruptcy, where Lord Eldon and other judges treated the official assignee, so far as he was possessed of assets, as a trustee, so as to prevent the operation of the Statute of Limitations.

But it has never been decided that there is any analogy between the official manager under the Winding-up Acts and the assignee in bankruptcy. On the contrary, it is against the whole scope and policy of the Winding-up Acts, that the assets which should come to the hands of the official manager should be dealt with on the footing of that trusteeship which has been recognised in the official assignee in bankruptcy. The assets which come to the hands of the official manager, are produced by calls on the contributories, and do not exist till the call is paid. It is impossible to read the Winding-up Acts without seeing that the intention was that the proceeding called winding-up should be conducted with all reasonable expedition, that the debts and liabilities should be ascertained as soon as possible, and that then the official manager should be put in possession of assets, in the shape of payments on the calls ordered by the Court.

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There is, in fact, no trust contemplated by the Act, as in bankruptcy, where the assets are in the first instance vested in the official assignee upon trust for an unascertained body of creditors. It follows, therefore, that the order to wind up a company does not suspend the operation of the Statute of Limitations. The present claim, therefore, must fail. But, moreover, this creditor might have just as easily come forward ten years ago as now, and, independently of the Statute, has been guilty of such laches as, in the view of a Court of equity, to disentitle him to the relief he seeks.

But there is also another objection. The Act of 1856 was designed to supply an omission in the original Act, by enabling the Master, by advertisement, to fix a time within which the creditor must come in and prove his debt, or lose the benefit of the winding-up order. This Act, which applies to all winding-up proceedings, does not in terms specify the time, but gives to the Master the power of doing so; and, under the authority of the Act, Master Richards, in February, 1858, issued advertisements specifying the time within which all the creditors must prove their debts. This creditor neglected to comply with that requisition, and cannot now be regarded as a creditor of the company. The motion must, therefore, be refused with costs.

IN THE MATTER OF THE GLOUCESTER,
ABERYSTWITH, AND CENTRAL WALES
RAILWAY COMPANY, AND THE WINDING-
UP ACTS.

1860.
Jan. 11th.

IN this case the official manager of the company moved to discharge an order of Master Tinney, dated the 8th of August, 1859, whereby the bill of costs of Messrs. Hill & Everill, the former solicitors of the company, was referred to the Taxing Master for taxation, without prejudice to any question as to the application of the Statute of Limitations.

The bill of costs which had been referred was for services rendered in 1845-6-7. On the 4th of May, 1849, an order was made to wind up the company. In October, 1849, a claim was carried into the Master's office by Messrs. Hill & Everill against the company. In November, 1849, the official manager requiring the deeds and documents in the hands of Messrs. Hill & Everill, on which they claimed a lien, in order to wind up the company, gave an undertaking in writing to the effect that, in consideration of Messrs. Hill & Everill delivering up the deeds and documents, the amount of their bill, when taxed, to the extent of 5000*l.*, should be paid out of the first funds that should come to his hands. This arrangement was sanctioned by the Master.

In July, 1859, Messrs. Hill & Everill sent in their claim to an amount exceeding 5000*l.* against the assets of the company. In the course of the year 1859 the official manager received the sum of 3000*l.* assets of the company.

On the 8th of August, 1859, Master Tinney made the

Where solicitors of a Joint Stock Company, after an order to wind up, delivered up documents to the official manager on his undertaking that they should be paid out of the first monies in their hands, and allowed nine years to elapse before delivering their bill (the official manager having until then had no funds in his hands)—the Court held that the claim was not barred by the Statute of Limitations.

Whether, after such delay, the solicitors were entitled to have a call made to satisfy their demand,
—*quære.*

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order for taxation, which was now sought to be discharged.

Mr. *Malins* and Mr. *Hetherington*, for the motion.

By the 58th section of the Winding-up Act (1848), it was expressly provided that nothing in the Act contained should alter or affect the rights of creditors against the company, nor the rights of the company against contributories or other persons.

In this case, no bill was delivered until twelve years after the alleged debt was incurred, but when it was delivered, the rights of the creditor and of the company were the same exactly as if no winding-up order had been made. It was quite clear that the pendency of a winding-up order did not deter the creditors from proceeding for the recovery of their debts: *Re The India and Australian Steam Packet Company*(a), and *Re The Dover and Deal Railway Company*(b); but if so, it seemed to follow that it could not suspend the operation of the Statute of Limitations(c). The right of these creditors, therefore, was, after delivery of a signed bill, at any time within six years, to proceed against the contributories, or if there were assets in the hands of the official assignee, against those assets.

But it was said that the official manager had given an undertaking to satisfy the claim; but the Statute was in full force against the undertaking, which, if it created any liability, was only a simple contract debt. It was, moreover, perfectly consistent with this undertaking, that Messrs. Hill & Everill should have pursued their remedies against the members of the company.

Mr. *Bacon* and Mr. *W. H. Terrell* appeared for Messrs. Hill & Everill.

(a) 17 Sim. 15. (b) Ibid. 18. (c) See *Forest's case*, *antè*, p. 42.

The VICE-CHANCELLOR :—

The solicitors of a Joint Stock Company, at and before the date of the winding-up order, had a considerable demand against the company. After the order was made, they carried in their claim as creditors of the company, and shortly afterwards, at the request of the official manager, they delivered up the books and documents relating to the affairs of the company, which were in their possession, and on which they had a lien for their bill of costs, on that gentleman giving them an undertaking to pay their bill, when taxed, out of the first funds that should come into his hands. On the faith of this obligation, they surrendered to the official manager the books and documents, without which, it would be impossible effectually to proceed with the winding-up. This arrangement was moreover sanctioned by the Master.

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The effect of this arrangement was to turn the legal right of action, which the solicitors then had against the company, into a right to enforce payment of their bill of costs by the official manager, on his undertaking. But, while the winding-up is proceeding, by means of the documents obtained under this arrangement, how can it be said that the Statute of Limitations is an answer to the claim? The Statute can have no application to a case of this kind. After what has taken place, it is not competent for the official manager to contend, that, because he has been unable for nine years to obtain money to satisfy the solicitors' claim, they are not to be paid at all. The injustice of making use of the Statute to defeat a claim under the Winding-up Act, is shown by the facts of the present case.

The solicitors were to be paid out of the first monies that should reach the hands of the official manager. After the winding-up has been going on for three years, the official manager obtains an order which was to put him in possession of 40,000*l.* On appeal, this order was

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discharged, and the official manager was left to obtain the money in some other way. But can the difficulty which the official manager experienced, and the time that was consumed in obtaining these conflicting decisions, be allowed to defeat the solicitors' claim, which is founded on the undertaking of the official manager? It is only recently that the official manager has obtained any funds available for the performance of his undertaking to pay this debt.

I am of opinion, therefore, that the solicitors are entitled to be paid their demand, and that the Master's order, except as to the reservation of the Statute as a defence, is right. The bill, however, must be taxed. But there ought to be some qualification of the order. Under the Winding-up Acts, the Court has power to direct calls to be made, but that is a power the Court may hesitate to exercise, after nine years' proceedings under the Statute have produced no benefit to creditor or shareholders. If the solicitors have allowed nine years to elapse, they must not expect the Court, as a matter of course, to recognise their claim to have a call made expressly for payment of their demand.

The order must be, to tax Messrs. Hill & Everill's bill of costs, and the amount found due to them for costs, charges and expenses to be paid by the official manager, out of the funds that should come to his hands; without prejudice to the question whether Messrs. Hill & Everill are entitled to have any call made for payment of the amount which, on taxation, may be found due, and also without prejudice to the question how the costs of taxation are to be borne.

MURRELL v. GOODYEAR.

1859.

Dec. 18th.

UNDER the will of Robert Alpe, Mary Elizabeth his granddaughter, the wife of Thomas Roper, was absolutely entitled to a legacy of 1200*l.*, which was paid to John Alpe and Thomas Butterworth in trust for her.

By indenture of lease and release, 1831, certain freehold and copyhold lands and hereditaments at Finchley, in Middlesex, were conveyed and surrendered to the use of Charles Friend, his heirs and assigns, and unto the said Charles Friend and his heirs, according to the custom of the manor. And by an indenture, dated the 16th of December, 1831, between Charles Friend of the first part, Frances Friend the wife of the said Charles Friend, and William Thomas Roper, and Mary Elizabeth, his wife, of the second part, and the said John Alpe and Thomas Butterworth of the third part, the said freehold and copyhold estate and hereditaments were respectively conveyed and covenanted to be surrendered unto the said John Alpe and Thomas Butterworth, their executors, administrators, and assigns, from the day of the date thereof, for the term of 1000 years, by way of mortgage for securing to them the repayment of the said sum of 1200*l.*, the said trust monies advanced and lent to Charles Friend by the said John Alpe and Thomas Butterworth as such trustees.

The said Charles Friend was adjudicated bankrupt in July, 1833, and J. Alpe, and T. Butterworth, with the consent of Frances Friend, W. T. Roper, and Mary Elizabeth his wife, obtained the usual order in bankruptcy for the sale of the mortgaged hereditaments by public auction, and having obtained leave to bid, purchased the freehold and copyhold hereditaments for 1020*l.* out of the legacy of 1200*l.*

A purchaser is not at liberty to use information derived from the abstract for his own advantage, adversely to the vendor. Therefore, where a purchaser, having ascertained that the concurrence of the heir was required to complete the title, gave notice to rescind the contract and bought up the interest of the heir, the Court decreed specific performance of the contract with costs, but allowed him to deduct from the price the sum he paid to the heir.

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By indentures dated the 16th and 17th of October, 1835, between T. M. Fonblanque, Esq. of the first part, John Alpe and Thomas Butterworth of the second part, B. Butterworth and P. T. Abbott of the third part, Frances Friend, W. T. Roper, and Mary Elizabeth his wife of the fourth part, W. G. Bell of the fifth part, J. C. Staple of the sixth part, and G. Alpe and C. Biggs of the seventh part, the said hereditaments were respectively conveyed and covenanted to be surrendered to the said J. Alpe and C. Biggs (the latter as trustee on behalf of Frances Friend, W. T. Roper, and Mary Elizabeth his wife), as to the freeholds, to the only use of the said J. Alpe, and C. Biggs, their heirs and assigns for ever, and as to the copyholds, to the use of the said J. Alpe and C. Biggs, their heirs and assigns for ever, at the will of the lord, according to the custom of the said manor; but, nevertheless, as to the freeholds and copyholds, upon such or like trusts, and for such or the like ends, intents, and purposes, as in and by the said will of the said testator, Robert Alpe, were expressed, declared, and contained of and concerning the said 1200*l.* thereby bequeathed on trust as aforesaid, or such of them as were then subsisting and capable of taking effect, or as near thereto as the different natures of such respective properties would admit of, it being the intent and meaning of the same parties thereto, that the said freehold and copyhold hereditaments should stand in the place of the said 1020*l.*, part of the capital sum of 1200*l.*, which had been applied in purchase thereof as aforesaid, and should be considered and taken as personal estate accordingly. And that the rents and profits of the said hereditaments and premises should be payable, and be paid and applied in like manner as the interest, dividends, and annual produce of the said sum of 1020*l.* would have been applicable and applied in case the same had continued in money, or invested on personal security.

At a Court Baron or Customary Court of the Manor of Finchley, held on the 25th of April, 1836, the said copyhold hereditaments were surrendered to the use of the said John Alpe and C. Biggs, their heirs and assigns, according to the custom of the said manor.

The said John Alpe died, leaving C. Biggs him surviving.

By an indenture, dated the 24th of March, 1843, between Frances Friend of the first part, William Thomas Roper, and Mary Elizabeth his wife, of the second part, and William James Norton, of the third part, which was duly acknowledged under the Fines and Recoveries Act, in consideration of 292*l.* 2*s.* 10*d.* due from W. T. Roper to the said W. J. Norton, and of 150*l.* then advanced by the said Norton to the said Frances Friend, William Thomas Roper, and Mary Elizabeth, his wife, the lands, &c. purchased (described by the parcels), situated at Finchley, were granted and conveyed, as to the freehold parts thereof, unto and to the use of the said Norton, his heirs and assigns for ever, and as to the copyhold parts, to the said Norton, his heirs and assigns for ever, at the will of the lord, according to the custom of the manor of which the same were holden; but upon trust that he, the said Norton, his heirs or assigns, should receive and take the rents, issues, and profits of the said freehold and copyhold hereditaments and premises thereby granted, released, and covenanted to be surrendered respectively, or intended so to be, as the same should from time to time become due; and thereout, in the first place, deduct all costs, &c. &c., in recovering the said rents and executing the said trusts; and, in the next place, to retain and apply all the residue of the said rents, &c., to and for the proper use and benefit of himself, the said Norton, his executors, administrators, or assigns, towards liquidation of the said sum of 292*l.* 2*s.* 10*d.*, with interest, or of so much as shall be due, with interest at 5*l.* per cent., to be computed

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from the date of the said indenture up to the time of repayment; and also in liquidation of all sums which the said Norton might pay to keep on foot the policy of assurance thereafter assigned, with interest as aforesaid, until by the means aforesaid, or otherwise, the whole of the said 292*l.* 2*s.* 10*d.*, interest and costs, had been fully paid; and after payment and full satisfaction thereof, upon trust that he, the said Norton, his heirs or assigns, should, upon the request and at the expense of the said Frances Friend, W. T. Roper, and Mary Elizabeth, his wife, reconvey and reassign the said freehold and copyhold hereditaments and premises unto the said F. Friend, W. T. Roper, and Mary Elizabeth, his wife, and the heirs or assigns of the said Mary Elizabeth, according to their respective estates and interests therein; and for the considerations aforesaid, the said Roper assigned unto the said W. J. Norton, his executors, &c., a certain policy of assurance, dated the 21st of March, 1843, in the Britannia Life Assurance Company.

On the 4th of December, 1850, W. T. Roper filed his petition in the Insolvent Debtors Court, under the protection statutes, and in his schedule stated his interest in the said land was as follows:—

“Under the will of my wife’s grandfather, Mr. John Alpe, my wife is entitled at the death of her mother, now seventy-four years of age, to thirteen acres of freehold, and one acre of copyhold land, situated at Finchley Common, Finchley, Middlesex, and known as Moss Hall. The said land is composed of arable and pasture land. In the month of March, 1848, I mortgaged my interest therein to Mr. William Norton, of New Street, Bishopsgate, to secure to him the repayment of the sum of 292*l.* 2*s.* 10*d.*, lent by him to me. My wife’s mother joined in the mortgage, and Mr. Norton has since that period received the annual rent thereof, 40*l.*, which will go in reduction of principal and interest, and the payment of

the premium on the policy of assurance for 300*l.*, which I effected on my life as a collateral security. I consider the said property worth 2000*l.* at least beyond the charge thereon."

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On the 25th of January, 1851, the plaintiff, H. E. Murrell, was appointed assignee of the estate of Roper, under the insolvency, and having accepted the trust, the Commissioner, by his certificate, dated the 25th of January, 1851, ratified the appointment, Samuel Sturgis being appointed provisional assignee.

On the 15th of February, 1851, a final order was made, and all the estate of Roper was vested in the plaintiff and Sturgis as provisional assignee.

By an indenture, dated the 4th of February, 1854, between W. T. Roper, and Mary Elizabeth, his wife, of the one part, and John Clements of the other part, W. T. Roper and Mary Elizabeth, his wife, jointly and severally agreed that they would, when requested, execute a valid mortgage, to be acknowledged by M. E. Roper, if necessary, of all the money, lands, &c., to which Roper was entitled in his own right, or that of his wife or which she, the said M. E. Roper, might have in her own right under the will of Thomas Alpe, as devisee, to secure the sum of 180*l.* and interest. The deed was never acknowledged by Mrs. Roper, or registered; no such mortgage deed was, in fact, ever executed.

Mrs. Roper died on the 29th of March, 1855, and letters of administration to her estate were granted on the 26th of September, 1856, to her husband. William James Norton died on the 20th of August, 1855, having by his will devised all his mortgage and trust estates to his son, W. H. Norton.

The whole of the 292*l.* 2*s.* 10*d.* having been paid out of the rents and profits of the estate, the plaintiff applied to Norton to convey the estate and pay the balance to him and Sturgis, the provisional assignee, which the

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latter was willing to do, but had received notice from Clements, dated the 4th of February, 1854, claiming to have a conveyance of the said land, and payment of the said balance. The creditors of Roper thereupon authorised the assignees to file a bill, but Sturgis refusing to join, the plaintiff alone filed his bill on the 11th of June in this court.

On the 19th of March the cause came on before the Master of the Rolls, who decreed that Clements was not entitled, but that the assignees of Roper were entitled to a conveyance of the premises, &c., and directed Clements to pay the costs of the suit.

In pursuance of the decree, by an indenture dated the 14th of June, 1858, C. Biggs and W. H. Norton conveyed to the plaintiff and Sturgis, and their heirs, all such and so many and such part or parts of the said messuage or tenement, pieces or parcels of land, and hereditaments called Moss Hall, in the said parish of Finchley, in the county of Middlesex, in the indenture of the 24th of March, 1843, comprised and freed from the said mortgage, unto the plaintiff and Sturgis, their heirs and assigns.

By an order, dated the 12th of July, 1858, made by the Commissioner of the Court for the Relief of Insolvent Debtors, acting in the matter of Thomas Roper, an insolvent debtor, the plaintiff was directed to sell the Moss Hall estate mentioned in Roper's schedule, &c., the plaintiff being at liberty to appoint Mr. Roberts the auctioneer.

On the 26th of August, 1848, the plaintiff caused the Moss Hall estate to be put up for sale by Mr. Roberts, under certain particulars and conditions.

The 5th condition was as follows:—

“ In the year 1843, the property stood limited to trustees in fee, in trust for Frances Friend for life, for her separate use, without power of anticipation, and after her decease, in trust for her daughter and only child, Mary Elizabeth, then the wife of William Thomas Roper. By

indenture of the 24th of March, 1843, Frances Friend, and William Thomas Roper, and his wife, mortgaged the property, and 150*l*, part of the mortgage money, was paid to them on their joint receipt, in consideration whereof, Frances Friend assigned her life estate, assuming to act as if sole and unmarried. The fact was, that her husband, Charles Friend, had some time prior to 1843 left this country for America (being at the time of his departure about sixty years of age), and was not afterwards, and has never since been heard of. Frances Friend died on the 7th day of January, 1853, at the age of seventy-one years, without having been again married. The purchaser shall not require any evidence to the fact or date of Charles Friend's death, nor make any objection or requisition founded on the mortgage by Frances Friend of her age, estate, on the ground that she was then married, but shall assume that such mortgage was valid."

The 6th condition :—

"The property is derived through William Thomas Roper, as administrator of his wife, Mary Elizabeth. The purchaser shall not be entitled to call for any further evidence that she was the only child of Frances Friend, than the recital to that effect in the indentures of the 16th and 17th of October, 1835; and the presumption afforded by the age of Frances Friend at that time, verified (if required) by the production of her baptismal and burial certificates (at the purchaser's expense); and such evidence shall be taken as conclusive."

The 10th condition contained, *inter alia*, the following :—

"The vendors are assignees of Mr. W. T. Roper, and no purchaser shall be entitled to any other covenant than several covenants by the vendors or conveying parties, that they have not encumbered the property."

The defendant, Goodyear, bid for the property at the sale, which was knocked down to him at 1400*l*. He paid

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140*l.* deposit, and signed the purchase contract, which was confirmed by the auctioneer in the usual way. An abstract was delivered to the purchaser's solicitor, according to the conditions of the sale, and, on the 10th of September, 1858, the purchaser's solicitor sent to the plaintiff the following requisition:—

“ By the 3 & 4 Will. 4, c. lxxiv., a married woman, by deed acknowledged, is enabled to dispose of any interest, charge, lien, or incumbrance, in, upon, or affecting lands, or money raised, or to be raised thereout (section 77). The wife, having conveyed the land by deed acknowledged, pursuant to her statutory power, would appear to have elected to treat it as land, and limited it accordingly (subject to mortgages to her heirs and assigns); consequently, unless some sufficient authority to the contrary can be shown, the purchaser will require the concurrence of her heirs-at-law and mortgagee, Clements, and her husband. Was Mrs. Roper's heir-at-law made a party to the suit, or served with a copy of the decree?”

Other requisitions were made, but the defendant treated the answer to all as satisfactory, except as to the 5th; and a long correspondence took place between the solicitors, which resulted in the opinion of Mr. Christie being taken, who was of opinion that the fee was vested in the heir-at-law and continuing heir of Mrs. Roper, and that the purchaser could not be advised to accept the title.

By an indenture of 15th November, 1858, William Thomas Roper, junior, the heir of Mrs. Roper, in consideration of 200*l.*, conveyed the freehold premises to the defendant Goodyear. The assignees having discovered this circumstance, on the 13th of December, 1858, sent to the defendant's solicitor the following letter:—

“ *Roper's Assignees v. Goodyear.*

“ Immediately after the interview between yourself and Mr. Scorth, on the 9th instant, we laid these papers

before Mr. Malins to advise, and we have this morning his opinion that the purchaser is bound to complete, on being allowed to deduct from his purchase-money the amount paid to the heir-at-law for the release of his interest, if any, together with his reasonable costs for obtaining such release; we therefore call upon the purchaser to complete on these terms.

"You can see the opinion, and have a copy if you wish; but we must have your reply on or before Wednesday next."

On the 15th of December, 1858, the defendant's solicitor wrote to the solicitor of the plaintiffs, offering "to take all the interest which the plaintiffs ever had in the property, or which they were justified in putting up for sale, namely, an estate by curtesy, in respect of and during the life of Mr. Roper, upon your deducing a good title to such interest, free from incumbrances, the value to be ascertained by a valuation."

The vendors refused to comply with this proposal, and insisted on the completion of the contract. After some further fruitless correspondence, the assignee, Murrell, filed this bill (the assignee, Sturgis, having refused to join unless indemnified, being made a defendant), alleging that the defendant had fraudulently obtained the conveyance of the said estate, and praying to have the agreement specifically performed, and that the defendant Goodyear might be declared a trustee for the plaintiff. The defendant insisted that the contract was rescinded, and that, consequently, he was not bound to perform the contract.

Mr. Malins and Mr. Welford, for the plaintiff.

The principle of this bill was, that the defendant having purchased up a claim, of which he became aware by means of the confidential communication made to him as

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purchaser, that he should be allowed to deduct only the amount expended in making such purpose. This was the doctrine laid down by Lord Redesdale in the case of *Cane v. Lord Allen* (a), and was acted on by Sir E. Sugden in *Lawless v. Mansfield* (b).

As to the defence set up, that the contract was rescinded, it was clear from the defendant's own evidence that the defence failed in fact.

[*Taylor v. Brown* (c), and *Macbryde v. Weekes* (d), were cited. On the objection to the title, *Briggs v. Chamberlain* (e), was referred to.]

Mr. Bacon and Mr. Langworthy, for the defendant.—The vendors clearly had only an estate for life. The assignees contracted to sell an estate, the inheritance in which was not theirs to sell, and now came to enforce the specific performance of such an agreement; but the bill must be dismissed with costs: *Howell v. George* (f): *Sugden's Vendor and Purchaser*, 181, s. 11.

The interest in the heir was not an incumbrance, but something inconsistent with the title of the plaintiffs; and selling with knowledge of the state of the title was, in fact, a fraud.

Even if the vendors had no notice of the defect, and sold in the belief his title was good, the Court would not enforce the contract.

The purchaser only waived his right to rescind conditionally that the vendors should comply with the requisition, and they having refused, the purchaser's right to rescind was restored. If so, his having acquired a knowledge of the property from the abstract was no objection.

It was plain, at all events, that the estate must be cleared of Clement's mortgage.

(a) 2 Dow, 296.

(b) 1 Drur. & W. 557.

(c) 2 Beav. 180.

(d) 22 Beav. 533.

(e) 11 Hare, 69.

(f) 1 Mad. 1.

Where a purchaser contracts for an estate with a vendor, who was not owner, but yet offered to make a title, this Court will not compel the buyer to take it: *Tending v. London* (a).

The case of *Cane v. Lord Allen* does not apply. All that was done there was, that a stranger paid off the debts.

It was quite clear that, by a fine, a married woman could make a title to land: *May v. Roper* (b); *Tuer v. Turner* (c).

[*Barrow v. Barrow* (d), *Stanton v. Tattersall* (e), were also cited.]

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The VICE-CHANCELLOR:—

The principles involved in this case are of the utmost importance. The defendant having entered into a contract with the plaintiff to purchase this estate, declines to complete the purchase on the ground that there has been a fraudulent misrepresentation of title on the part of the plaintiff.

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It appears, however, from the evidence of the defendant himself, that so far from the misrepresentation, if such it was, being fraudulent, that at the earliest stage of the examination of the title, the defendant himself pointed out that there was a question whether the property was, in point of law, real or personal estate, and accordingly the first requisition was that the vendor should procure the concurrence of the heir-at-law. That was a perfectly sound view on the part of the defendant, but it excludes altogether the notion of fraudulent misrepresentation. That part of the case therefore fails.

The case, then, becomes simply one in which the vendor having a defective title, the means of curing the defect were pointed out by the purchaser.

(a) 2 Eq. Cas. Ab. 680, s. 9.

(d) 4 K. & J. 409.

(b) 4 Sim. 360.

(e) 1 S. & G. 529.

(c) 20 Beav. 560.

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It appears that the defendant, on the requisition not being complied with, affected to rescind the contract with the plaintiff, and bought up the interest of the heir-at-law, and he now claims to be entitled to the benefit of the bargain. But the rescinding of the contract is, in fact, disproved by the defendant himself; for, after this alleged rescinding of the contract, he proceeded to take a conveyance to himself from the heir-at-law, in which this very contract with the plaintiff is recited, and it is also recited that the question of title is pending between the plaintiff and the defendants Sturgis and Goodyear. It is obvious, therefore, that the contract was not rescinded, and that part of the defence also fails.

The case is therefore reduced to this, that the purchaser, having ascertained a flaw in the title, which made necessary the concurrence of a third party, affects to rescind the contract, and then, without notice, deals with that third party who, he believes and is advised, is entitled to the estate as reversioner in fee. But this Court will not permit a purchaser to make use of information derived through the contract for a purpose prejudicial to the interests of the vendor. The Court has even gone so far as to hold that the conscience of each of the contracting parties being bound by the contract, it will not permit the person who has contracted to sell an estate to which he had no title, and to which, after the contract, by dealing with the actual owner, he obtained a good title, to evade his contract. The Court imposes on him the obligation to fulfil the contract which, at the time he entered into it, he had not the power to fulfil, but which, by his own subsequent acts, he acquires the means of performing. The Court considers that the vendor, having obtained the means of completing the contract, and of conveying to the purchaser what he had contracted to sell, is bound in conscience to fulfil the obligation which he has incurred.

Reference had been made to Lord St. Leonards'

Vendors and Purchasers, in order to support the defendant's case, and were this the case of a fraudulent vendor, the authority of that great text book would have fortified the defendant's case. But, inasmuch as the case of a fraudulent misrepresentation wholly fails, and ought never to have been set up, the passage in Lord St. Leonards' book, which is really applicable to the case, will be found at p. 297, sect. 30 (a), where Lord St. Leonards says, "If a man sell an estate to which he has no title, and after the conveyance acquire the title, he will be compelled to convey it to the purchaser. This is said to be a personal equity affecting the conscience of the party."

In this case, the defendant has endeavoured to use the contract, and the information derived from the abstract, for a purpose adverse to the interests of the vendor with whom he had contracted, but advantageous to himself. That advantage he cannot be allowed to retain. In order to benefit himself, he has himself cured the defect in the title of which he complained. But, he must be allowed to deduct from the price the amount he paid to the heir-at-law, and he must pay the residue of the purchase-money, and the costs of the suit. The decree, therefore, must be that the 200*l.* paid to the heir-at-law be deducted from the purchase-money, and 25*l.* for the expense of a conveyance from the heir; and decree the specific performance of the contract, and refer it to chambers to settle the conveyance to be executed by all necessary parties.

Mr. *Osborne*, as provisional assignee, in whom, by the vesting order, the whole of the insolvent's estate was vested, claimed to receive the purchase-money.

The VICE-CHANCELLOR. — Both the assignees are parties to the suit, and the purchase-money must be ordered to be paid to both.

(a) 13th ed., page 421; sect. 36 of 11th ed.

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Where a defendant out of court has conceded the relief asked by the bill, the Court, on motion by the plaintiff, stayed all proceedings in the cause, and ordered the defendant to pay the costs of the suit.

Where a chattel, from being used in business or otherwise, has a peculiar value, the Court will entertain a bill for an injunction to restrain its sale or detention.

NORTH v. THE GREAT NORTHERN RAILWAY COMPANY.

THIS was a motion in the following terms:—

That the costs of the suit may be taxed and paid by the company, the plaintiff consenting to the dismissal of the bill; and that all further proceedings should be stayed.

The suit was instituted to restrain the company from selling and detaining certain coal waggons belonging to the company.

The plaintiff was the owner of certain collieries, and of fifty-three coal waggons, or trucks, marked with his initials, and which had been seized and detained by the defendants.

By an agreement, dated the 27th of July, 1857, between the plaintiff and Messrs. Prior, the plaintiffs agreed to sell to them 50,000 tons of coal, to be supplied in three trains, commencing from the 1st of August, 1857, &c. It was also agreed that Messrs. Prior might convey the coal in their own trucks, but should they require the plaintiff's trucks, he should charge one shilling per ton for six days' use of such trucks, and on each monthly average of the trucks so used, one shilling and sixpence additional per waggon per day for detention, *et cetera*.

The plaintiff, in pursuance of such agreement, supplied the said coal, and also fifty-three waggons, which had been employed in conveying the coal supplied by the plaintiff between Nottingham and London. The bill averred that the hire of waggons was a common and well-known practice.

It appeared, that, by an agreement, dated the 27th of July, 1857, though the fact was unknown to the plaintiff till the 3d of August, 1858, between Messrs. Prior and the Railway Company, it was agreed that Messrs. Prior should deliver at Nottingham and certain other stations,

tons of coal, to be carried by the company to their coal depôt at King's Cross, and that if such quantity were not delivered, that Messrs. Prior should pay to the company such sum as if that quantity had been carried. That Messrs. Prior should provide waggons for carrying the coal, and deliver at the coal depôt at King's Cross all such empty waggons as they should require to have forwarded, and cause to be affixed to every waggon a printed ticket, with the name of the colliery to which it was intended to be forwarded, and deliver to the company an invoice of such waggons; "and that in the event of any payments not being duly made by Messrs. Prior as provided by the said agreement, the company should be at liberty to retain as security for such payments the waggons to be supplied by Messrs. Prior, and that the company should have power from time to time, on giving twenty-one days' notice thereof to Messrs. Prior, and on their neglect to pay the same, to sell and dispose of the waggons, or any of them, and of any coal in the same, being on the premises of the company, and retain the same, and reimburse themselves all monies due to them for the carriage of coal, and also for monies to become due to the company for any deficiency in the supply of the said 50,000 tons of coal."

The plaintiff denied that he was aware of the above agreement, or authorized the company to pledge his trucks. It appeared, that his fifty-three trucks were employed by Messrs. Prior in the carriage of coal. On the 27th of July, 1859, Messrs. Prior caused the said fifty-three trucks to be delivered to the company, who detained them, and on the 28th of July, the plaintiff was informed, Messrs. Prior received a notice from Mr. Grinling, the company's agent, threatening to sell the waggons, unless within twenty-one days, the sum of 4575*l.* was paid. The plaintiff, on the 31st of July, gave notice that, unless the threat was withdrawn within three days, the plaintiff would file a bill in the Court of Chancery. On

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the 3d of August, the plaintiff's solicitors wrote to Messrs. Johnston, Farquhar, and Leech, stating, that the company not having withdrawn the threat, the plaintiff intended filing a bill; and inquiring whether, to avoid multiplicity of suits, the company would submit to be bound by the order made in the suit by Mr. North. The defendants' solicitors, on the 4th of August, 1858, wrote to the solicitors of the plaintiff, stating, they were prepared to concur in any course which might avoid instituting three suits where one would answer the purpose, and, with that view, were willing to consent that any order made in a suit by Mr. North should be equally binding, as to all the trucks, on all parties, as if they were parties to the suit. On the 10th of August the bill was filed, and on the 12th of August, 1858, the defendants' solicitors wrote a letter containing the following passage:—"We have not yet received a copy of the affidavits, but, inasmuch as the question will be decided on the motion for an injunction, it appears to us the better course will be for the matter to stand over until November, the company undertaking that they will not in the mean time sell the waggons." On a demand by the defendants' solicitor that the company should be answerable for damage, that was declined, but the solicitor stated, he had no objection, in addition to the undertaking not to sell the waggons, to enter into a mutual understanding that all proceedings should stand over until November, without prejudice to the rights (liabilities) of any of the parties to the suit, *et cetera*. The company then entered into an undertaking to that effect. In consequence of this correspondence, the application for the injunction was not prosecuted; but on the 29th of November, 1858, the plaintiff commenced an action of trover in the Common Pleas to try the company's right to detain the waggons.

The action came on for trial on the 21st of February, 1859, before Mr. Justice Crowder and a special jury, when

a verdict was found for the plaintiff for the amount claimed in the declaration, with by consent a reference to Serjeant Hayes to assess the damages sustained by the unlawful conversion and detention of the waggon. The order of reference, "and by the like consent," ordered that the power of the arbitrator shall not be limited to assessing and awarding damages to the plaintiff up to the time of the commencement of the action; but that he shall, in addition to the value of such, if any, of the waggons and trucks claimed in the action, as the plaintiff is entitled to have given up to him, and as shall not have been given up, assess, and award to the plaintiff all such damage as he shall find the plaintiff has incurred, *et cetera*, and is entitled to recover from the defendants by reason of the loss, detention, or depreciation of the waggons up to the making of the awards and delivery of the trucks, with power to award costs."

On the 6th of July, 1859, Mr. Serjeant Hayes awarded to the plaintiff 915*l*. with costs.

Shortly after the award, the defendants delivered up the waggons.

The plaintiff, on the 12th of July, wrote to the company's solicitor to inquire whether the defendants would consent to an order to dismiss the bill, costs to be agreed on, to which the defendants' solicitor replied, declining such proposal, on the ground that the suit was unnecessary.

The plaintiff then gave this notice of motion.

Mr. *Baggallay*, for the motion.—The defendant has, either by consent, or by the result of the arbitration, conceded to the plaintiff everything sought by the bill; it is obvious, therefore, the object of the suit is accomplished, except as to the costs. Under these circumstances, the plaintiff is entitled to have the bill dismissed, or the proceedings stayed, and the costs paid by the defendants: *Sivell v. Abraham* (a).

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(a) 8 Beav. 598.

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Mr. *T. Stevens*, for the defendants.—This is a bill for the delivery up of a specific chattel, as to which no peculiar value was alleged, and was therefore demurrable. It was well settled that “a bill could not lie for anything merely personal, any more than it would for a horse or a cow:” *Duke of Somerset v. Cookson (a)*.

Again, “Where there could be no compensation by damages, or where there was a trust, this Court would decree delivery up of a specific chattel, without measuring the value:” *Fells v. Read (b)*; but here it was quite clear the money value of the waggons could be, and actually was ascertained. It was submitted, therefore, that this cause did not come within any of the exceptions to the rule against granting relief in respect of a personal chattel.

But, secondly, by proceeding at law, the plaintiff had, in fact, abandoned his suit, or, at least, had elected to proceed at law; it was clear, in such case, the bill was useless, and ought to be dismissed with costs.

[*Mitford on Pleading*, by *Smith (c)*, was also cited.]

Judgment.

THE VICE-CHANCELLOR:—

As to the jurisdiction of the Court to restrain the sale of the coal waggons, the law is quite settled. The extract, from Lord Redesdale’s book on Pleading, referred to by the defendants’ counsel, is fatal to the defence. Lord Redesdale says, “If the remedy afforded by the ordinary courts is incomplete, a court of equity will lend its aid to give a complete remedy.”

There can be no doubt, that, on the statements in the bill, the plaintiff’s trade being such as it is, the coal waggons were of special value to him, in order to carry on his business. The sudden sale of these waggons, without which the trade could not be conducted, must necessarily

(a) 3 P. Wms. 389.

(b) 3 Ves. 70.

(c) Pp. 138, 139.

have inflicted serious injury by the interruption of his trade.

It is no answer, to say that it is possible to state a sum of money which would have been sufficient compensation for the injury. The Court looks at the circumstances of the case, with reference to the right to the specific thing. It cannot be pretended that the plaintiff could have got, on a sudden, fifty-four other coal waggons fit for his business as readily and promptly as he could have purchased fifty-four tons of coal, or fifty-four bushels of wheat.

Where specific things, necessary for conducting a particular business, are in the possession of persons who claim a lien upon them, and threaten an immediate sale, this Court has undoubted jurisdiction to interfere by injunction, and prevent irreparable injury to the debtor, by giving him an opportunity of redeeming assets. The passage cited from Lord Redesdale, attributes to the Court greater jurisdiction than merely to protect the property, but asserts the jurisdiction of the Court, where justice requires it, to order the delivery up of the specific thing.

In the present case, the question was settled by the defendants adversely to themselves, before the action was brought. They had threatened to sell these coal waggons, which were then under their control; and when the plaintiff gave notice of his intention to apply to this Court to restrain the sale, they never questioned the jurisdiction, but submitted to it by undertaking not to sell the waggons until the first day of Michaelmas Term, 1858. But what followed? The bill had then performed its office of protecting the property against the sale. The question that remained was the right to the property, which the plaintiff conceived would be more conveniently dealt with by a court of law. The defendants, on their part, no longer insisted on their right to sell; but the parties joined in an arrangement that the matter should

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stand over, and that the right should be tried by an action in trover, which would not deprive the plaintiff of his right to the specific chattels. By consent of both parties, the question whether the fifty-four waggons should be restored in specie was left to the arbitrator, who decided in the plaintiff's favour.

From the award, it is beyond dispute that the plaintiff has succeeded; and he now comes to ask that all proceedings in the cause may be stayed, and that the defendant may pay the costs of the suit. This now seems a matter of course, inasmuch as the plaintiff has succeeded by this suit in preventing the threatened sale.

It cannot be said that the plaintiff has elected to proceed at law, and that the bill must be dismissed; first, because the plaintiff obtained relief by what was tantamount to an injunction, which he could not otherwise have done; and, secondly, because it was not by the election of the plaintiff, but by the arrangement of both parties, that the questions at issue were determined at law.

These questions have since been settled in the plaintiff's favour, for it has been decided that the threatened sale was improper, and that the plaintiff was entitled to have the property delivered to him by the company. He has been right, therefore, in the whole contest, and the company wrong. There must be an order to stay all proceedings in the suit, and the defendants must pay the costs.

LEGG v. MATHIESON.

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Jan. 28th.

THIS bill was filed by Thomas Legg of Dorset, brewer, on behalf of himself and all other the mortgagees of the Bridport Railway Company, and of the tolls and sums of money arising by reason of the Bridport Railway Act, 1845, and it prayed as follows:—

A judgment creditor of a Railway Company, who had obtained an *elegit*, was restrained from taking possession of the land and chattels belonging to the company as against prior mortgagees to whom were assigned the undertaking, calls on shareholders, and tolls.

That it might be declared that the mortgages of the Bridport Railway Company, and the tolls and sums of money arising by virtue of the Bridport Railway Act, 1855, made by the company as aforesaid, are valid mortgages of the land whereon the Bridport Railway and its appurtenances, including the rails, are constructed; and that the mortgagees have priority to all claims and demands against the defendant, Mathieson, under the said judgment, writ of *elegit*, inquisition, or otherwise.

The bill also prayed for an injunction and receiver.

By the Bridport Railway Act, 1855 (18 & 19 Vict. c. xi.) incorporating the Companies Clauses, Lands Clauses, and Railway Clauses, Consolidation Acts, except so far as was expressly varied or altered, the construction of a railway was authorized from a point in the road from Beminster to Bridport, to Maiden Newton, on the Wilts and Somerset Railway, at a point in the Sydling Road. The capital was fixed at 65,000*l.* in 10*l.* shares, with power to the company to borrow shares not exceeding 21,000*l.*; but that no part should be borrowed till the whole of the 65,000*l.* had been subscribed for, and one-half paid up. The Act also provided that the company might demand and receive tolls not exceeding those specified by the Act, and might enter into agreements with the Great Western Railway Company for not more than ten years, for certain purposes, which were generally, that the railway might be worked by the Great

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Western Railway, wholly or in part, and that arrangement might be made for the mutual convenience of the two companies.

By the "Companies Clauses Consolidation Act, 1845," it was amongst other things enacted, that the expression, "the special Act," used in the said Act, should be construed to mean any Act which should be thereafter passed incorporating the Joint Stock Company for the purpose of carrying on any undertaking, and with which the "Companies Clauses Consolidation Act, 1845," should be incorporated; and that the expression "the undertaking," should mean the undertaking or works, of whatever nature, which should by the special Act be authorized to be executed; and further, that if the company should be authorized by the special Act to borrow money on mortgage, it should be lawful for them, subject to the restrictions contained in the special Act, to borrow on mortgage such sums of money as should from time to time, by an order of a general meeting of the company, be authorized to be borrowed, not exceeding in the whole the sum prescribed by the special Act, and for securing the repayment of the money so borrowed with interest, to mortgage the undertaking and the future calls on the shareholders in manner thereafter mentioned.

By the Companies Clauses Consolidation Act, 8 Vict. c. 16 and 17, it is enacted, that the expression, "the undertaking," shall mean, the undertaking or works of whatever nature which shall by the special Act be authorized to be executed.

By the Lands Clauses Consolidation Act, 8 Vict. c. 18, s. 2, it is enacted, the expression, "the undertaking," shall mean "the undertaking and works, of whatever nature, which shall by the special Act be authorized to be executed."

By the Railway Clauses Act, 8 Vict. c. 20, the expression, "the undertaking," shall mean the railway and

works of whatever description by the special Act authorized to be executed.

The railway was completed, and opened for traffic on the 12th of November, 1857, and has been in operation ever since. The whole capital having been subscribed for, and one-half paid up, the company, under the authority of a general meeting, by virtue of their power under the Bridport Railway Company borrowed from several persons the sum of 21,000*l.* on mortgages in the form prescribed in Schedule C. of the Companies Clauses Act, 1845. In August, 1856, the plaintiff lent the company 600*l.* on the security of one of such mortgages, which was in the following terms:—

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“ The Bridport Railway Company.

No. 8. Mortgage. — 600*l.*

By virtue of the Bridport Railway Act, 1855, we, the Bridport Railway Company, in consideration of the sum of 600*l.* paid to us by Thomas Legg of Allington, in the county of Dorset, brewer, do assign unto the said Thomas Legg, his executors, administrators, and assigns, the said undertaking and all future calls on shareholders, and all the tolls and sums of money arising by virtue of the said Act, and all the estate, right, title, and interest of the company in the same, to hold unto the said Thomas Legg, his executors, administrators, and assigns, until the said sum of 600*l.*, together with interest for the same at the rate of 5*l.* for every 100*l.* by the year, be satisfied, the principal sum to be repaid at the end of three years from the date hereof, at the principal office of the company in Bridport, in the county of Dorset.

Given under our common seal this 7th day of August, in the year of our Lord, 1856.

“ E. G. FLIGHT, Secretary.”

In October, 1857, the plaintiff advanced a further sum

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of 200*l.* on the same security. There were in all twenty-two mortgages.

On the 3rd of July, 1858, the defendant, Mathieson, who was the contractor employed by the Bridport Railway Company in the construction of their railway, commenced an action against the company to recover 315*l.* 11*s.* 8*d.*, awarded to him by the arbitrator, after giving credit for 71,200*l.* 14*s.*, and to recover also 149*l.* 3*s.* for costs. The action was tried at Bristol in 1858, when a verdict was taken by consent for debt and costs for 3300*l.* 14*s.* 8*d.*

On the 3d of March, 1859, judgment was signed, and on the 2d of April following was registered, and a writ of *fi. fa.* directed to the Sheriff of Dorset, who levied 31*l.* 14*s.* 6*d.* on the company's goods, and after deducting expenses, paid the defendant Mathieson 24*l.* 4*s.* 9*d.*

After the return of the *fi. fa.*, the defendant, Mathieson, caused a writ of *elegit* to be issued, directed to the sheriff and endorsed, to levy the amount remaining due on the judgment; and the sheriff, in execution of the writ, impanelled a jury, who found that the company were possessed of goods and chattels, to wit, the rails of the railway, of the value of 2000*l.*, and that the said company were seised of the land whereon the Bridport Railway and its appurtenances, other than the said rails, are constructed.

Paragraph 14, introduced by amendment into the bill, was as follows:—

“The said rails are fixed by screw bolts and nuts to sleepers, which over a portion of the line are constructed of iron, and over the remainder of wood, and are connected at right angles by iron cross-ties, or wooden transoms, fixed to the sleepers by rivets or screws, and the sleepers and cross-ties and transoms are imbedded in the earthwork of the permanent way, and the rails cannot be disconnected from the iron sleepers without removing or deranging such sleepers; and, in fact, the sleepers, cross-ties, transoms, and rails, form one connected continuous construction,

from one end of the line of railway to the other, and are so connected with the earthwork and substratum thereof as to form a part of the permanent way, which would cease to be a railway if the rails were removed therefrom."

By agreements, dated the 5th of February, 1857, and 1st of February, 1859, between the Great Western Railway Company of the one part, and the Bridport of the other part, the Bridport Railway was leased to the Great Western Railway Company for twenty-one years from the 1st of July, 1858, on terms therein mentioned, with a proviso for raising 20,000*l.* additional capital; and at a special general meeting of the company, held on the 27th of July, 1858, Messrs. Mitchell & Hodgson were authorized to conclude an agreement with the Great Western Company. The said agreement of the 1st of February, 1859, was affirmed at a special general meeting on the 28th of February, 1859, and a bill introduced into Parliament for its adoption.

This bill was subsequently filed, alleging that the sheriff was about to deliver possession to the defendant of the rails and land.

The cause now came on for hearing, an *interim* injunction having been obtained.

Mr. *Malins* and Mr. *Bird*.—If the mortgage is valid, it is perfectly clear that the plaintiff is entitled to the protection of this Court. The mortgage is in the form prescribed by Schedule C. of the Companies Clauses Act, and was prior in date to the defendants' judgment.

By the interpretation clauses, the words "undertaking" must be interpreted to mean the works of whatever nature. It was submitted, therefore, that the plaintiff was entitled to the relief he prayed.

Mr. *Bacon* appeared for the Great Western Railway Company, and Mr. *C. M. Roupell* for the Bridport Railway Company, and supported the plaintiff's case.

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Mr. *Jolliffe* appeared for the Sheriff of Dorsetshire.

Mr. *Craig* and Mr. *A. Smith*, for the defendant,
Mathieson.

Under his writ of *elegit*, the defendant is entitled to all the land and the chattels thereon. [The VICE-CHANCELLOR.—The 11th section of the 1 & 2 Vict. c. 110, regulates proceedings under the *elegit*.] The plaintiff is not mortgagee of the land at all, but simply of the undertaking, which means the works and tolls, rates and dues. His position is that of the holder of a Welsh mortgage, having a right to hold the property till paid; and the defendant does not seek to disturb any right vested in him. The right to the works, tolls, and calls, does not give the right to the railway; for though in the Railway Clauses Act the undertaking means the railway, by the Companies Clauses Act, under which the mortgage is made, the undertaking means only the works. The rails are chattels attached to the land, and the defendant is entitled to them under the *elegit* (a).

(a) 1 & 2 Vic. c. 110, s. 11.
“And whereas the existing law is defective, in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law, be it therefore further enacted, That it shall be lawful for the sheriff or other officer to whom any writ of *elegit*, or any precept in pursuance thereof, shall be directed at the suit of any person, upon any judgment, which at the time appointed for the commencement of this Act shall have

been recovered in any action in any of her Majesty's Superior Courts at Westminster, to make and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, including land and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, of at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might without the assent of

In this case the mortgagees were not in possession by means of a receiver, as in the case of *Russell v. The East Anglian Railway Company* (a), though in that case it was held that a bond creditor had no lien on the effects of the company, so as to exclude the right of a judgment creditor of the company to seize the goods and chattels under a *fi. fa.*

The case of *Myatt v. St. Helen's Railway Company* (b) was nearly identical with the present. There was a demise of the undertaking and tolls, &c. The Act gave a form of mortgage, whereby the company "assigned the undertaking of all and singular the tolls," &c. &c.; yet the Court held that the mortgagee acquired no interest in the land.

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any other person exercise for his own benefit in like manner as the sheriff or any other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of elegit is sued out, which lands, tenements, rectories, tithes, rents, and hereditaments, by force and virtue of such execution shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such accounts in the Court out of which such execution shall have been sued out as a tenant by elegit, is now subject to in a Court of equity; provided always, that such party suing out execution, and to whom any copyhold or customary lands should be so delivered in execution, shall be liable, and is hereby required to make, perform, and render to the lord of the manor or other person entitled, all such and the like

payments and services as the person against whom such execution shall be issued would be bound to make, perform, and render, in case such execution had not issued; and that the party so suing out such execution, and to whom any copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same, until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied; provided also, that as against purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this Act, such writ of elegit shall have no greater or other effect than a writ of elegit would have had in case this Act did not pass."

(a) 3 M. & G. 104—125.

(b) 2 Q. B. 364.

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In *Hart v. The Eastern Counties Union Railway Company* (a), under a mortgage of the undertaking and tolls, it was held that the stock and property of the company, as carriers on the soil, did not pass, but that a judgment for money lent must be satisfied out of their general property as carriers.

[*Furness v. The Caterham Railway Company* (b) was also cited.]

At all events, the defendant was entitled to take all the surplus and other lands which were not used for the purpose of traffic.

But, secondly, if the plaintiff is entitled in priority to the company, he was bound to have a receiver appointed, or he could not defeat the right of a judgment creditor: *Berney v. Sewell* (c); that the plaintiff was entitled to have a receiver there could be no doubt: *Fripp v. The Chard Railway Company* (d).

Judgment.

The VICE-CHANCELLOR:—

The plaintiff and those on behalf of whom he sues, are the mortgagees of the Bridport Railway; and, according to the language of the special Act, and of the general Acts incorporated therewith, the mortgages are “an assignment of the undertaking of, and all future calls on shareholders, and all the tolls and sums of money arising by virtue of the Act, and all the estate, right, title and interest in the same” until the monies secured by such mortgages should be repaid.

The interpretation clause of the 8th & 9th Vic. c. 16, defines the expression, *undertaking*, to mean the undertaking or works of whatever nature, that is, the works authorized to be made, which must necessarily mean the rails, stations, and other buildings; but the interpretation clause of the 8th & 9th Vic. c. 20, also incorporated with this company, goes further, and defines the same expression to

(a) 7 Exch. 246.

(b) 25 Beav. 614.

(c) 1 Jac. & W. 647.

(d) 11 Hare, 241.

mean the railway and works, which places the matter beyond a doubt. The defendant is a creditor who has obtained judgment against the company, and, upon that judgment, has issued a writ of *elegit*, by which he acquired at law a right to the possession of the rails and chattels of the company, and of all their lands, tenements, and hereditaments, except so far as that right is affected by a paramount title.

The plaintiffs are mortgagees of the undertaking and works, and it seems impossible to say that a mortgage of the undertaking, granted under the authority of the Act, does not necessarily include the interest of the company in their works, and rails, and land as incident to the working of the railway which is authorized to be made, or to say, that what is assigned is something separate and distinct from the land. The station houses must also form part of the works comprised in the mortgage. In short, it is impossible to separate the subject matter of the mortgage from the land on which the railway is constructed; and even were it possible, the moment the land was taken from the plaintiffs, the security would be of little value. At the same time, the property assigned is of a somewhat anomalous kind, and, in consequence of its peculiar character, it has been contended that these mortgages are like Welsh mortgages, that is, that the property is to be held by the mortgagee till the debt was satisfied. But the title of prior mortgagees in this court, is paramount to that of any judgment creditor. It is true, the writ of *elegit* has vested in the defendant the land and chattels of the company, and, but for the injunction, he might, doubtless, have entered into possession, and have interrupted the traffic. But if the plaintiff has a prior claim, as he unquestionably has, it is a matter of course, for this Court, at the instance of the prior mortgagee, to interpose by injunction, to prevent the subject matter of the mortgage being withdrawn or dealt with by any subsequent incumbrancer. It has been argued, on behalf of

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the defendant, that at all events there may be land not covered with rails or works, and therefore, not included in the plaintiff's security ; but I can find nothing separate from the land of which the defendant could take possession, without serious interference with the plaintiff's rights to the undertaking and tolls.

The right of the mortgagees, under the deed, is to hold the undertaking until the debt is paid, and that they manifestly cannot do, unless they are protected by this Court against the legal right, which the defendant has obtained under his judgment.

It has been contended, that the plaintiffs are unable to assert their rights, unless by the appointment of a receiver. But the nature of the property is such that a receiver would be of little use.

On the whole case, the plaintiffs have established their right as mortgagees, against the defendant, the judgment creditor ; there must, therefore, be a declaration that the defendant, under his *elegit*, has no right to take the land or the works, and an injunction, in conformity with that declaration, without prejudice to any other right which the defendant may have against the company ; and the defendant Mathieson must pay the costs of the suit.

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*Jan 27th,
28th, 30th
& 31st.
Feb. 10th.*

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THIS bill was filed by Messrs. Kennard as mortgagees, for the purpose of having it declared that, under the provisions of the 4th & 5th Wm. & M. c. 16, against clandestine mortgages, the defendant Futvoye had forfeited the right of redemption, in equity or elsewhere, of the "Crystal Palace" and premises, and that the plaintiffs were entitled to hold and enjoy the same for the estate and interest of the said F. Futvoye therein, freed from all equity of redemption, and as fully to all intents and purposes as if the plaintiffs, on the occasion of the said mortgage of the 12th of July, 1858, absolutely purchased the Crystal Palace and premises from the said Futvoye, and that the defendant Bebb had no estate or interest in the said Crystal Palace and premises, or any part thereof.

The bill also prayed that the defendant Nicholay might be ordered to execute to the plaintiffs a proper and absolute lease of the said Crystal Palace and premises, according to the respective terms of the said agreement of the 24th of June, 1857, and the 25th of February, 1858.

The bill stated that by an agreement in writing, dated the 24th of June, 1857, the defendant John Augustus Nicholay, in consideration of 3000*l.* thereafter agreed to be expended, agreed with George Gold that if the erections hereinafter mentioned should be finished before the 25th of March then next, on the ground of the said J. A. Nicholay, situate at Bell Yard, Oxford Street, in the county of Middlesex, the said J. A. Nicholay would, at the costs of the said G. Gold, demise to him the said premises for the term of fifty-seven and a quarter years from the day of the date of the agreement (short one day), at the yearly rent of 400*l.*, subject to the covenants and conditions therein contained.

By a second agreement in writing, dated the 25th of

On a bill filed against a mortgagor to enforce a forfeiture under the 4th & 5th Wm. & M. c. 16, for concealment of a prior mortgage, the Court held that the statute confers no active remedy in this Court, and dismissed the bill against the mortgagor without costs, and against a puisne incumbrancer with costs.

The statute is penal in its character, and must receive strict construction; therefore neither an equitable mortgagee by deposit of title deeds, nor by deed of further charge without any proviso for redemption, is an after mortgagee within the meaning of the Act.

Until the legal right to redeem is determined, there can be no equity of redemption within the provisions of the statute.

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February, 1858, made between Nicholay, G. Gold, and the defendant Frederick Futvoye, it was agreed that the said agreement of the 24th of June, 1857, should be read and construed as if the name of the said Frederick Futvoye had been inserted therein in lieu of the name of the said G. Gold, and as if the time for erecting and covering in the said buildings had been the 24th of June, 1858, and not the 25th of March, 1858, and as if the sum of 6000*l.* had been inserted in lieu of the said sum of 3000*l.*, the sum thereby agreed to be expended; and the said J. A. Nicholay thereby agreed with the said F. Futvoye that he would, on request, grant to him a lease of the premises known as No. 13, John Street, adjoining to the land and premises above mentioned, for the said J. A. Nicholay's term therein (less one day), at the yearly rent of 40*l.*, subject to the same covenants and agreements as might be inserted in the lease to be granted to the said J. A. Nicholay as aforesaid, and applicable to the lessee.

Futvoye being desirous to erect the Crystal Palace, applied to Messrs. Kennard, and had several interviews with Mr. Howard John Kennard. In December, 1857, it was agreed that the plaintiffs should prepare the necessary plans and specifications, and build and complete the bazaar, and keep the buildings and premises in repair for twelve months from its completion for the sum of 8000*l.*, for which they were to receive out of the rents of the stalls interest at 10*l.* per cent.; and, after payment of interest and all outgoings, it was agreed that the net profits should be divided equally between Messrs. Kennard and Futvoye. It was also agreed that two sums of 2000*l.* each, part of the said 8000*l.*, should be raised by Futvoye among Messrs. Kennards' connection, such sums of 2000*l.* to be paid to Messrs. Kennard in part payment of the said 8000*l.* It was further agreed that the sum of 4000*l.*, being the balance, should be secured to them

by a mortgage of Futvoye's interest in the said premises, subject to the said mortgages for 2000*l*.

In pursuance of the said agreement, by an indenture, dated the 4th of March, 1858, in consideration of the sum of 2000*l*. then advanced and paid by Kennard, Nottage and Morris, the said Futvoye assigned to the said three persons all and singular the benefit of the said agreements of the 24th of June, 1857, and the 25th of February, 1858, and all the premises comprised therein, and all buildings which might be erected on the same, for all the estate, right, title and interest of the said F. Futvoye therein; with a proviso that the said F. Futvoye, his executors, administrators and assigns, should be entitled to redeem the said premises on payment of the said 2000*l*. and interest.

In further pursuance of the said agreement, by an indenture, dated the 5th of March, 1858, after reciting the above agreement and the said indenture of the 4th of March, and that the said sum of 2000*l*. thereby secured had been advanced by the three said mortgagees to Futvoye, and had been paid over by him to the plaintiffs, it was witnessed that the plaintiffs covenanted with the said Futvoye that they would, on or before the 20th of June then next, complete the said buildings in conformity with the said plans and specifications, and keep them in repair for twelve months. And, after provisions for the application of the rents and profits in conformity with the terms of the said agreement, the said Futvoye thereby covenanted with the plaintiffs that he should, as and when any sums should be paid to him according to the then stating indenture, pay one moiety of the same to the plaintiffs, in addition to the interest of 10*l*. per cent. on the unpaid part of the sum of 4000*l*. (residue of the sum of 8000*l*.); yet so that such sums to be from time to time paid to the plaintiffs should not be deemed part of the surplus or residue of the rents and profits, or as giving to

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the plaintiffs any right, title, or interest to or in the said surplus and residue; nor should they, or either of them, be entitled to have an account against the said F. Futvoye, of or in respect of the profits (if any) which might be derived, or the loss which might be sustained, by the said F. Futvoye in relation to the said bazaar; it being the intention of the parties thereto that the business of the said bazaar, and the profit and loss thereof, should be solely and exclusively the business and profit and loss of the said Futvoye; and that nothing therein contained should be deemed to create or constitute a partnership between the parties thereto. And the plaintiffs covenanted with the said Futvoye that they would not commence or prosecute any action or suit against him for or by reason of the said sum of 4000*L.*, residue of the said sum of 8000*L.*, until default should have been made in payment of the sums of money thereinbefore covenanted to be paid; or in due observance of the covenants thereinbefore contained. It was thereby further agreed that, in case the said Messrs. Kennard, Nottage and Morris should, at any time after the expiration of the three years, require payment of the said sum of 2000*L.*, then the plaintiffs, in case the receipts of the bazaar should be sufficient, after paying working expenses, to pay 10*l.* per cent. on the said sum of 4000*L.*, and if and when they should be requested so to do by the said Futvoye, should pay off the principal and interest then due and owing on the said mortgage of 2000*L.*, and take a transfer of the same, and should not foreclose the equity of redemption in the same for seven years from the 3d of March, 1858, unless default were made in payment of interest; and in the mean time, indemnify the said Futvoye.

By an indenture, dated the 6th of March, 1858, after reciting the two first-mentioned agreements, and the deed of the 5th of March, it was witnessed that the said Fut-

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voye assured to the plaintiffs the benefit of the said agreements of the 24th of June, 1857, and the 25th of February, 1858, and all his estate and interest therein, subject nevertheless, to the aforesaid mortgage of the 4th of March, 1858. The said Futvoye gave the plaintiffs a power of attorney; and it was declared that the assignment thereby made was made to the plaintiffs by way of mortgage, to secure to them all the sums to become payable to them under the deed of the 5th of March. It was thereby declared that the said F. Futvoye should be entitled to redeem the same premises on payment to the plaintiffs of the moneys thereby secured, with interest at ten per cent. If default were made in payment of the said sums or interest, or in the observance or performance of the said covenants, it should be lawful for the plaintiffs to foreclose or to sell the premises. The said F. Futvoye further covenanted with the plaintiffs, when requested by them or either of them, to obtain from the person liable to grant the same a lease of the premises agreed to be demised, according to the terms of the said agreement; and forthwith, when requested by the plaintiffs, to demise the said premises unto them for all the term of such lease (except the last day) to the intent that the same might be held by the plaintiffs by way of further security for the money and interest intended to be thereby secured.

In June, 1858, it was arranged that the time for completing the building should be extended, and other additions made at a cost of 2000*l.*, which was to be secured by Futvoye.

By an indenture of the 12th of July, 1858, in order to carry into effect this arrangement—after reciting the deeds of the 5th and 6th of March, and that the plaintiffs had proceeded with the erection of the said buildings, and at the request of the said F. Futvoye had made some altera-

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tions and additions to the said works, and reciting the agreement last above mentioned, and that it had been agreed that the said additional sums, making together 2000*l.*, with interest at the rate aforesaid, should be paid by the said F. Futvoye to the plaintiffs, and be charged on the premises mortgaged by the said deed of the 6th of March, in the like manner, and subject to the like provisions as were contained in the said deed with reference to the 8000*l.* there mentioned, and as if the contract sums had been one entire sum of 10,000*l.*—it was witnessed that, in consideration of the sum of 10,000*l.* (part whereof, namely, 2000*l.*, had been paid by the said F. Futvoye to the plaintiffs, as thereinbefore mentioned), the plaintiffs thereby covenanted with the said F. Futvoye that they would, on or before the 30th of September, 1858, complete the said buildings according to the former plans, together with the additions, and keep the buildings in repair as aforesaid.

By another indenture, of even date, it was witnessed that the said F. Futvoye covenanted with the plaintiffs that the said sum of 2000*l.* should be paid by the said F. Futvoye to the plaintiffs, with interest at the rate aforesaid, and be charged and chargeable upon the premises mortgaged by the said indenture of the 6th of March, 1858, in like manner as, and subject to the provisions therein contained with reference to, the 8000*l.* thereby secured, as if the contract sum had been one entire sum of 10,000*l.*; and, further, that the agreements of the 24th of June, 1857, and the 25th of February, 1858, and all and singular the premises comprised therein, should be charged as well with the payment to the plaintiffs of the said sum of 2000*l.* and interest, at the rate aforesaid, as of the principal and interest moneys to be secured by the said indenture.

It appeared from the evidence that, by an indenture, dated the 21st of April, 1858, between Futvoye of the

one part, and one R. M. Jones of the second part, reciting the agreements of the 24th of June, 1857, and of the 25th of February, and 5th and 6th of March, 1858, and that there was owing by Futvoye to Jones 1600*l.*, and that Jones had agreed to advance a further sum of 400*l.*, and that Futvoye had given a warrant of attorney to enter up judgment for 3000*l.* and interest, it was witnessed that, in consideration of Jones forbearing to enforce payment of the 1600*l.*, and of the further advance of 400*l.*, Futvoye covenanted with Jones that he would, on demand in writing, pay the said 2000*l.* and any further advances by Jones to the extent of 2500*l.*, with interest at 10*l.* per cent., and costs. It was further agreed that the premises comprised in the said two agreements of the 24th of June, 1857, and the 25th of February, 1858, and the buildings thereon, and the rents and profits thereof, subject to the said mortgage of 2000*l.* to Kennard, Nottage, and Morris, and to the said deed of the 6th of March, should stand charged with and subject to and be and remain a security for the payment to the said Jones, his executors, &c., of the said principal money, interest, and costs. The said deed also contained a power of sale in default of payment of the principal thereby secured, and interest at 10*l.* per cent.

It appeared also that, by an indenture dated the 14th of April, 1859, Futvoye assigned his interest in the agreements of the 24th of June, 1857, and the 25th of February, 1858, and in the premises therein mentioned, to Mr. Bebb, to secure 812*l.* with interest at 5 per cent.

On the 23d of April, 1858, judgment was entered up against Futvoye by Jones for 3000*l.*, who also claimed 300*l.* in respect of a further advance.

By an indenture, dated the 13th of May, 1859, Messrs. Kennard paid off Jones his 2000*l.*, and took an assignment of his debt.

The bill alleged that the plaintiffs had paid off the

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principal and interest secured by the deed of March 4th, and had taken a transfer to themselves of the mortgage.

The bill charged that, under the 4th & 5th Wm. & M. c. 16, the defendant Futvoye had forfeited his equity of redemption in the mortgaged premises, by concealing from them on the occasion of his mortgage to them, dated the 12th of July, 1858, the prior mortgage (to Jones), dated the 21st of April, 1858, and the judgment he had allowed to be entered up.

The bill alleged that the plaintiffs, having obtained a transfer of the interest of Kennard, Nottage, Morris, and Jones, had absolutely vested in them the whole interest of the defendant Futvoye, and that they had applied to Nicholay to grant them a lease of the Crystal Palace, in pursuance of the agreement of the 24th of June, 1857, and the 25th of February, 1858.

The Crystal Palace was completed on the 30th of September, 1858.

The bill alleged that, on the occasion of approving of the deed of the 12th of July, 1858, the clerk of the plaintiff's solicitor asked Futvoye whether he had incumbered the premises since the mortgages of the 5th of March, 1853, when he replied he had not, and that the deed had, in order to accommodate Futvoye, been executed in such haste, as to leave no time to search the register.

The defendant Futvoye admitted that he had given no notice to the plaintiffs of Jones's deed, but averred that, if he had, Jones would have acquiesced in the priority of the plaintiffs, as the value of the property was so considerable. He contended also, that the plaintiffs, by their conduct, had admitted his right to redeem, but denied that he had made the statement imputed to him.

Argument.
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Mr. *Malins* and Mr. *H. Stevens*, for the plaintiffs.

It is admitted, that, on executing the mortgage to the plaintiffs of the 12th of July, 1858, the defendant did

not discover to them in writing the prior mortgage to Jones. The case was therefore within the very words of the statute.

There was one case in which the right given by the statute was fully recognised, though the Court thought the conduct of the second mortgagee did not entitle him to relief: *Stafford v. Selby* (a).

It would be contended that the mortgage to Jones, being a mortgage by equitable deposit, was not within the statute; but the right to redeem was a right existing exclusively in equity, and the construction of the statute must be according to the doctrines of this Court.

On the question of what constituted a mortgage, and of the remedies of an equitable mortgage, the following cases were cited: *Parker v. Housefield* (b); *Paine v. Smith* (c); *Newton v. Aldous*, *Meux v. Ferne*, *Spring v. Allen* (d), referred to in *Parker v. Housefield*, and *Rolleston v. Moreton* (e); *Jones v. Bailey* (f); *Messer v. Boyle* (g); *Cowdry v. Day* (h); and *Powell on Mortgages*, Smith's ed. p. 268, were cited.—[The VICE-CHANCELLOR:—The only relief granted in favour of an equitable mortgagee is sale. Where there is no equity of redemption there can be no foreclosure.] In *Jones v. Bailey* (i), the Court directed foreclosure; here, the words were, “to charge the premises,” which was the expression used in the 13th section of the 1st & 2d Vic. c. 110 (k). There was here, moreover, an agreement to execute a legal mortgage.

(a) 2 Vern. 588.

(b) 2 M. & K. 419.

(c) Ibid. 417.

(d) Ibid. 421.

(e) 1 Drur. & W. 171.

(f) 17 Beav. 582.

(g) 21 Beav. 559.

(h) *Ante*, vol. 1, p. 316.

(i) In that case, his Honour having sent for the Registrar's book, 16th December, 1853, it was

ascertained that the decree drawn up was for a sale.

(k) “Whereas great frauds and deceits are too often practised by necessitous and evil disposed persons in borrowing money, and giving judgments, statutes, and recognisances privately for securing the payment of the said money; and the same persons do afterwards borrow money upon security of their

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Mr. Bacon and Mr. Tripp, for the defendant Futvoye.

This is a *qui tam* bill to obtain the benefit of a forfeiture which, it is alleged, has been created by the statute; and it is to be observed that there is no case in which the Court has enforced such an equity. *Stafford v. Selby* (a), if it was any authority at all, was against the plaintiff, for the defence set up was overruled.

lands of other persons, and do not acquaint the latter lender thereof with the same, whereby such late lender is very often in danger to lose his whole money, or forced to pay off the debts secured by the said judgments, statutes, and recognisances, before they can have any benefit of the said mortgages; and whereas divers persons do many times mortgage their lands more than once without giving notice of the first mortgage, whereby lenders of money upon second or after mortgages do often lose their money, and are put to great charges in suits and otherwise. For remedy thereof, and preventing the same as much as may be for the future,

Be it enacted, that if any person or persons who have or hath once mortgaged, shall mortgage any lands or tenements to any person or persons for security of money lent, or otherwise, or for any other valuable consideration; and if the said mortgagor or mortgagors shall again mortgage the same lands or tenements, or any part thereof, to any other person or persons, for valuable consideration (the said former mortgage being in force and not discharged), and shall not discover to the said second or other mortgagee or mort-

gagees, or some or one of them, the former mortgage or mortgages in writing under his or their hands, then the said mortgagor or mortgagors, his, her, or their heirs, &c., shall have no relief or equity of redemption against the said second or after mortgagee or mortgagees, his, her, or their heirs, &c., upon the said after mortgage or mortgages; but that such mortgagee or mortgagees, his, her, or their heirs, &c., shall and may hold and enjoy such more than once mortgaged lands and tenements for such estate and term therein as were or was granted and conveyed by the said mortgagor or mortgagors against him, her, or them, his, her, or their heirs, &c., freed from equity of redemption, and as fully, to all intents and purposes, as if the same had been an absolute purchase, and without any power or liberty of redemption."

The second section refers to judgments, and the epitome is as follows:—

"Debtor upon judgment taking up money of another upon a mortgage, without notice of judgment to mortgagor, shall lose his equity to redeem."

(a) 2 Vern. 588.

But, secondly, the alleged second mortgage was no mortgage at all. All that was done was to charge premises already mortgaged to the plaintiffs with a sum borrowed of Jones, but if the plaintiffs had not, in their haste to squeeze out the defendant Futvoye by this penal statute, improvidently paid off Jones's claim, there was nothing to prevent them from tacking.

But, even if there had been an equitable mortgage, that would not be enough to bring the case within the statute. This was a penal statute, and must be construed strictly. The Act of 6th Geo. 4, c. 16, s. 135, provided that that Act should be construed beneficially for creditors, but there was no such provision in this statute.

But, even if there had been a borrowing and lending, the relation between the plaintiffs and the defendants was that of partners, not that of mortgagee and mortgagor.

Mr. *Craig*, with Mr. *Martindale*, appeared for the defendant *Bebb*, but was stopped by his Honour.

Mr. *W. H. Cole* appeared for the defendant *Nicholay*.

Mr. *Malins*, in reply, contended that this was the exact case contemplated by the statute.

The VICE-CHANCELLOR:—

The object of this bill is to obtain from the Court a declaration under the statute of 4 & 5 Wm. & M., that the defendant Futvoye has forfeited his right to redeem the property comprised in the plaintiff's mortgage. The provisions of the statute have seldom come under the review of this Court.

The plaintiffs' case is, that the defendant Futvoye on the 12th of July, 1858, executed to them the mort-

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gage of that date without having discovered to them in writing the mortgage which he had granted of the same property, dated the 12th of April, 1858; and they contend that this concealment by Futvoye is within the statute, and gives a right to come to this Court to foreclose the equity of redemption.

But, looking at the language of the statute, it seems certain that the remedy provided is wholly negative. There are no words which shew an intention to give a mortgagee the right to come actively into this court to enforce the forfeiture which the Act enacts. The third section, on which this suit is framed, in plain terms enacts two things:—

First, that a mortgagor granting a second mortgage without giving to the second mortgagee notice in writing of the prior mortgage, shall not be entitled to redeem.

Next, that such second mortgagee shall hold and enjoy the mortgaged lands free from all equity of redemption, just as if he had been a purchaser.

These two provisions determine the equity of redemption, and deprive the mortgagor of his right to redeem in this court.

To bring a case within the statute, there must be at least two mortgages, a first mortgage which had not been discovered to the second mortgagee. The statute deals only with mortgages in the ordinary sense; there are no words in the statute to authorize the Court to apply its provisions to anything but what in the strictest sense is a mortgage.

It has been contended, that an equitable mortgage by deposit of title deeds, and even that all charges at law and in equity created by the person who has already mortgaged the premises without notice, are within the statute. If there be a simple charge without an equity of redemption, that is, if there be nothing more than a debt charged

upon an estate, without any conveyance of the estate to the creditor, or any right or equity of redemption reserved, such a security is not a mortgage and does not seem to fall within the statute, because a charge is at once extinguished by payment of the debt, and from its nature must subsist till the debt is satisfied.

There is nothing in the statute to deprive a mortgagor, who has committed the fraud against which the statute was directed, of any right he may have at law to redeem. What is contemplated by the Act is the equity of redemption, and, so long as there is a legal right to redeem the property, the statute seems to have no application.

It is not surprising that the statute has been so seldom resorted to, considering that its provisions are so peculiar. For example, unless the mortgagor discovers in writing the prior mortgage, the mortgagor has lost his right to redeem. A verbal notice, however clear and although often repeated, would not prevent the operation of the statute.

Looking at the operation of the statute, together with the law of this Court, it is easy to understand why it is that, since the reign of Queen Anne, there is but one reported case in which the aid of the statute was sought by a mortgagee, and the decision in that case was little favourable to the plaintiffs' case. Still, as the question has been raised, it is the duty of this Court to put a construction on the statute; and I must therefore hold that the statute does not contemplate that the Court should make a declaration or decree in order to confer an active remedy.

But there is a further difficulty in the way of the relief prayed by the bill. In order to bring the case within the statute, there must be a first and a later mortgagee. The word "mortgage" in the statute must have its technical and proper meaning, because the penalty which it inflicts is distinctly

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a forfeiture of the equity of redemption. Here the instrument, which is called a first mortgage, is not in form or substance a mortgage at all. It is, in fact, nothing more than a mere charge without a proviso for redemption, or any time fixed for redemption. There is, indeed, a covenant to execute a legal mortgage when called on. But under this instrument, the first mortgagee, Jones, was entitled to insist on retaining a charge without being incumbered with a mortgage containing a proviso for redemption, or the necessity for a foreclosure. He might prefer a charge, as giving an immediate right of sale. How, then, can it be said that this security is a mortgage within the meaning of the statute? The statute speaks of a mortgage, not of a general charge; and the instrument now in question is clearly not a mortgage, but an equitable charge, which gave the person entitled to it a right to file a bill to enforce it by sale.

But, again, there must be a first mortgage — not a charge, but a mortgage with a proviso for redemption; and there must also be a second mortgage without discovery in writing of the first; and the statute goes on to require that the mortgagor “shall again mortgage the same lands or tenements, or any part thereof, to any other person or persons, for valuable consideration.” But what is the later mortgage, *i.e.* the deed of the 12th of July, 1858? A deed of equitable further charge, reciting only the prior mortgage, but containing no proviso for redemption or sale. It has been contended that, by this deed of further charge, the proviso for redemption in the prior mortgage extends to the monies subsequently advanced.

But I look into these deeds, and I find them incumbered with a complication of provisions which, if they had all been executed on the 12th of July, would make it impossible for this Court to hold that, upon the

construction of this statute, this mortgagor has lost or could lose any equity of redemption within the words of this statute. The argument has been that the whole substance of these securities, one and all—not only of those of the 21st of April and the 12th of July, but of those of the 4th and the 6th of March, together with the intermediate deed of the 5th of March—amounts to an aggregate of equitable rights. That is perfectly true; and you may have, within the provisions of the statute, an equitable mortgage with a power of redemption, and if you had, it would be a case to which the statute clearly applies. But how is it possible to say, if the instruments of the 4th of March and the 6th of March come to be examined, having regard to the effect of the deed of the 12th of July, that this statute contemplated that the equity of redemption which is contained in the previous mortgage should be lost? What the statute says as to the mortgagor is, that he shall have no relief or equity of redemption against the second mortgagee upon the said after mortgage. That means only the after mortgage; and if you show that the after mortgage requires, in order to complete the instrument of mortgage, the insertion of a proviso for redemption of a large antecedent debt, it is impossible to say that it is within the provisions of the statute at all.

It is hardly worth while to go through the other difficulties in the plaintiff's way, because these prior instruments, which contain provisos for redemption, are so framed, that to my mind it is difficult to say whether the provisos for redemption in these deeds are not now subsisting so as to give a power to redeem at law—a power which may still be existing at law as a legal power. The statute enacts no forfeiture of a legal right to redeem, but only of an equity of redemption.

It is not necessary to go into a more minute examina-

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tion of the deeds, considering what was the object of the whole transaction. It is clear enough that the arrangement amounted to a partnership. The plaintiffs have complained that, whatever money was wanted to carry on the speculation, the plaintiffs were called upon to pay it. But the whole scope of the instruments shows that when money was wanted, Messrs. Kennard were to pay it, for Mr. Futvoye had none. Messrs. Kennard entered into a speculation with Mr. Futvoye, which they took care should be a joint speculation, with a provision that it should not be attended with the inconveniences of a technical partnership—a partnership, from which they were to derive the utmost possible profits.

Upon the whole case, looking at the statements in the bill, and the nature of the facts, I can come to no other conclusion than that the plaintiffs entirely fail in showing a case for equitable relief under the statute, upon the ground stated in the bill.

It has been truly said that the statute was intended to provide against a case of fraud. No doubt it was; and the provisions of the statute are remarkable, for it can hardly be said that a man is guilty of fraud who, upon granting a second mortgage, tells the second mortgagee expressly that there is a prior mortgage, but does not make the discovery to him in writing. But, on the other hand, it is impossible not to see that it is a gross fraud for a mortgagor, who has granted a mortgage to one person, to go to a second mortgagee and allow him to advance his money under the impression that he is to be first mortgagee, and conceal from him the fact that there is already a sum charged upon the same estate. Therefore there is some ground for charging Mr. Futvoye with improper conduct in not disclosing the execution of Jones's security.

But the question here as to conduct is only as to how Mr. Futvoye's conduct may affect the judgment of the Court upon the question of costs. Upon the judgment

of the Court as to the relief prayed by the bill, it can have no effect at all. There is an alternative relief asked by the bill. The subject-matter of the plaintiffs' security was an agreement for a lease of the property in question, which is a valid agreement between Futvoye, their mortgagor, and Nicholay, one of the defendants in this suit. That agreement for a lease was assigned by way of mortgage to the first mortgagee; and Messrs. Kennard, who have acquired the rights of first mortgagees, themselves being second mortgagees, have taken an assignment of the agreement also. But, so far as any question exists between Futvoye and Messrs. Kennard, with reference to their rights under that agreement for a lease—it must be considered, not with reference to any one of these deeds, or to any one or more of their clauses, but to the scope and effect of the complicated provisions of the whole of them. The plaintiff has rested his right as mortgagee upon the fact of his security being an assignment of this agreement. If it rested there, he might have strong ground to insist upon a right to get a lease granted directly to him from Nicholay, without being driven to take an underlease from Futvoye. But there is an express provision in the first deed, that, at the request of the plaintiffs, Futvoye should be bound to obtain a lease from Nicholay, and grant an underlease to them. The foundation of the plaintiffs' argument is, that that request gives the plaintiffs the option, and they may either assert their right under the contract, which they decline to do, or, not making the request, they may assert their right under an assignment of the whole equitable interest. But that view I cannot take, looking at the whole provisions of the deed; because, although the underlease is to be at the request of the plaintiffs, what is to be looked at is, the rights of the tenants on an underlease, and

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nothing short of an assignment of a lease, when actually obtained, can justify their going against Futvoye, and through him against Nicholay, to grant a lease to them.

Therefore, looking at the whole of this second part of the case, I think the prayer of the plaintiffs, who ask, as against Futvoye, to have a lease granted directly to them, cannot be granted.

There only remains the question of costs. Upon that, considering what the conduct of Futvoye has been—that, having been greatly in difficulties, and being in difficulties now, he concealed the mortgage to Jones at the time when the deed of July was executed—I cannot reconcile it with my sense of justice to dismiss the bill with costs as against him. The bill, therefore, must be dismissed as against him, without costs; but with costs as against Bebb and Nicholay.

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RICHARD REES was the lessee of certain land at Llanwonno for a term of ninety-nine years, and, by an indenture, dated the 2d of July, 1858, he assigned to the plaintiff the leasehold property in question for the residue of the term of ninety-nine years, subject to the covenants in the said lease contained, and subject to a mortgage to David Williams of 250*l*, which 250*l* was to be deducted from the purchase-money of the assignment.

In March, 1858, the premises were advertised for sale by Mr. Hollier, the solicitor of Messrs. Williams & Llewellyn, the mortgagees; and on such property being put up for sale, the plaintiff directed Messrs. Morgan & Smith, his solicitors, to give Mr. Hollier notice of his wish to redeem. On the 31st of March, one of that firm called on Mr. Hollier, and stated to him the plaintiff's wish to redeem, on which Hollier stated he was not then prepared to give an account of what was due for principal, interest, and costs, but, that if Messrs. Morgan & Smith would write to him, he would obtain such account, and let them know. He stated also that there was a second charge on the property.

On the 1st of April, Messrs. Morgan & Smith wrote to Mr. Hollier, and on the same day received the following reply:—

“Aberdare, 1st April, 1858.

“Dear Sirs,—The mortgage upon Richard Rees's property, called the ‘Miskin Inn,’ was some time since transferred to my clients, Messrs. Williams & Llewellyn, who have also a judgment against that party, which amounts to 40*l*. odd, which they will, of course,

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Feb. 14*th*,
15*th*, 16*th*,
& 17*th*.

1. Where a mortgagee, after tender of his principal and interest (the costs being unascertained), sold under the power in his deed, the Court set the sale aside against him and a person who had bought with knowledge of the tender.

2. A purchaser who buys with knowledge of circumstances, sufficient as against the mortgagee to invalidate the sale, becomes a party to the transaction, and is not protected by the proviso that the purchaser need make no inquiry.

3. Where the costs are unascertained and the security ample, a mortgagee, after a tender of principal and interest, is not entitled to proceed with the sale—*Semble*.

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tack to their mortgage security. It will take about 340*l.* to clear off principal, interest, and costs. It will suffice, perhaps, when I state that the conditions of mortgage have been broken, and that proper notice has been given. My client, Mr. T. H. Evans, the assignee appointed by the Insolvent Court, intends to dispute your client's title to the equity of redemption, or to the surplus (if any) of the proceeds of sale, upon grounds which appear to me, to say the least, valid; and, unless the assignee is arranged with, I can see no alternative for my clients, the mortgagees, other than paying such surplus (if any) into the Court of Chancery, under the Trustees Relief Act. I shall be glad to submit any proposal you make to the assignee, with a view to avoid litigation and delay.

“ I am, Gentlemen,

“ Yours truly,

(Signed) “ H. J. HOLLIER.

“ Messrs. Morgan & Smith.”

On the 3d of August, the plaintiff wrote to the defendant Williams as follows:—

“ Sir,—I hereby give you notice that I shall attend at your residence at Yniseynon in the parish of Aberdare, on Monday, the 5th day of April instant, at 12 o'clock in the forenoon, for the purpose of paying up the principal money and interest secured to you on mortgage of the ‘ Miskin Inn ’ and premises situate in the parish of Llanwonno, in the county of Glamorgan, late the property of Mr. Richard Rees, but which property was purchased by me subject to such mortgage on the 2d day of January last. And I further give you notice not to sell the said property, and that I shall hold you responsible for any

loss which I may sustain by your so doing. Dated the 3d day of August, 1858.

“JOHN JENKINS.

“To David Williams, Esq.,
“Yniseynon House, Aberdare.”

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The 8th and 9th paragraphs of the bill were as follows:—

8. “Upon the 5th day of April, 1858, being the day before the said sale was to take place, no further information having then been received by the plaintiff or his solicitors from the said Henry John Hollier as to the said transfer or the said judgment, and an account of principal money, interest, and costs not having been rendered as promised by the said Henry John Hollier, the plaintiff, together with a clerk of his said solicitors, named Lewis, went to the house of the said David Williams, and tendered to him the sum of 261*l*., as the principal money and interest which would be due upon the said mortgage on the 16th day of April then next, such sum being in fact the principal and interest which would then be due. The said David Williams, however, refused to receive the said sum of 261*l*., on the ground that he had, on the 16th day of March previously, transferred his mortgage to the defendants, Bethuel Williams and Llewellyn Llewellyn, who had given him their promissory note for the sum of 261*l*., being principal money and interest due thereon up to the 16th day of April then next. In fact the said mortgage and further charge had been transferred to the said Bethuel Williams and Llewellyn Llewellyn, who were in partnership as timber merchants, and as such partners had given the said promissory note.”

9. “On the same day the said clerk of the plaintiff’s said then solicitors went to the place of business of the said

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defendants, Bethuel Williams and Llewellyn Llewellyn, and saw the defendant Bethuel Williams, and informed them of the plaintiff's said assignment, and his wish to redeem; and the plaintiff himself also called upon the same defendants, and found the clerk of the plaintiff's then solicitors then with the said Bethuel Williams. The plaintiff then stated to the said Bethuel Williams that he the plaintiff was ready and willing to redeem the said mortgaged premises, and he thereupon tendered to the said Bethuel Williams the sum of 261*l.* as such principal money and interest as aforesaid, and asked to have the deeds delivered up to him. The said sum of 261*l.* was tendered in bank notes to the amount of 260*l.*, with one sovereign. The defendant Bethuel Williams, however, refused to deliver up the deeds or to receive the money, and denied the plaintiff's right to redeem; and he referred the said clerk of the plaintiff's said then solicitors to the said Henry John Hollier."

On the 6th of April, 1858, the plaintiff, with his solicitor, attended at the sale, and placed the sum of 261*l.* in bank notes and gold on the table in the auction room, stating the amount, and then offered it to the auctioneer. And the plaintiff also gave notice of his title to the property, and asserted his right to redeem the mortgaged premises. But the auctioneer, and the clerk of the mortgagee's solicitor, refused to accept the amount. The sale then proceeded, and the property was knocked down to the defendant Jones at 400*l.*, to whom the plaintiff immediately gave the following notice that he would not acquiesce in the sale:—

"Sir,—I hereby give you notice that I claim the 'Miskin Inn' and premises just purchased by you, as my property, and I further give you notice not to pay over the purchase-money for the said property to any other person than to me; otherwise you will be compelled to

pay the same over again. Dated the 6th day of April, 1860.

“MORGAN & SMITH,
“per JOHN JENKINS.

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“To Mr. Alfred Jones,
“Castle Inn, Aberdare.”

In December, 1858, the purchaser, Jones, commenced an action in ejectment to recover the property, to which action the plaintiff, by permission, appeared, and notice of trial was given for the Spring Assizes in Glamorganshire. The plaintiff subsequently discovered that the judgment referred to in the letter of the 1st of April as a charge on the property, was dated on the 22d of June, 1858, subsequent to the assignment to the plaintiff; and it was never registered, and was only for 33*l.* 14*s.* 4*d.*, with a blank left for costs.

On the 10th of March, 1859, the plaintiff filed his bill to redeem.

The mortgage to Messrs. Williams containing the power under which the sale took place, contained a proviso, that if default should be made in payment of the said sum of 200*l.* or the interest thereof on the 1st of December, 1857, it should be lawful for the said David Williams, his executors, administrators, or assigns, to sell the said mortgaged premises either by public auction or by private contract, with full liberty to buy in or rescind any contract for sale, and to resell, without being responsible for any loss which might be occasioned thereby; and to do and execute all such acts and assurances for effectuating any such sale as the said David Williams, his executors, administrators or assigns, should think fit. That the receipts of the said David Williams, his executors, administrators, or assigns, for any purchase-mones should be effectual discharges to any purchaser under the power; and that such purchaser should not be concerned

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to see to the application of such purchase-money, nor be accountable for the non-application or mis-application thereof. That the said David Williams, his executors, administrators, or assigns, should not execute the power of sale until he or they should have previously given or left on the said premises a notice in writing to the said R. Rees, his executors, administrators, or assigns, to pay off the monies for the time being owing on the security of the indenture, and default should have been made in such payment for six calendar months after giving or leaving such notice, or until some half-yearly payment of interest, or part of some such half-yearly payment of interest, should have been in arrear three calendar months. It was further provided that, upon any sale purporting to be made in pursuance of the aforesaid power, no purchaser should be bound to inquire whether either of the cases mentioned in the clause lastly stated had happened, nor whether any money remained due on the security of the said indenture, nor as to the propriety or regularity of such sale, and that, notwithstanding any impropriety or irregularity of such sale, the same should, as regarded the purchaser or purchasers, be deemed to be within the aforesaid power, and be valid accordingly.

The defendant Williams, in his answer, admitted that shortly before the sale the plaintiff's solicitor called on him and said something about the sale which he did not recollect, but he denied that any tender had been made.

The defendant Jones in his answer admitted that the money had been offered in the auction room, but alleged that he knowing nothing of the accounts between the parties, and relying on the assurance of the vendor and the auctioneer, had bid for the property. He admitted also that he had received notice from the plaintiff that he would not acquiesce in the sale.

There was considerable conflict in the evidence.

It was admitted that the right to tack the judgment could not be maintained.

Mr. *Malins* and Mr. *C. Hall*, for the plaintiff, contended that, on the defendant's own showing, there had been an oppressive use of the power of sale, against which this Court would relieve, and that the purchaser, being aware of the facts, was a party to the transaction, and could not support the sale against the plaintiff.

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Mr. *Bacon* and Mr. *Stiffe*, for the purchaser.

Mr. Jones purchased the property without knowledge of the state of the account between the mortgagor and mortgagee, and was exempted from inquiring. He had nothing whatever to do with the question between the plaintiff and his mortgagees, and however irregular or whatever their conduct might be, it could not affect his rights.

In *Green v. Pulsford* (a), where notice was given to a purchaser that the sale was bad, as a fraud on the settlement, the Master of the Rolls refused to direct any inquiry, and dismissed the bill with costs.

But where there are covenants in a deed of assignment on the part of a mortgagor, he may refuse to take the principal and interest, though tendered, till he has consulted his attorney whether he can safely execute: *Wiltshire v. Smith* (b).

It was clear, also, that by his notice to the purchaser on the day of the auction the plaintiff had recognised the sale, and only claimed the purchase-money.

Mr. *Greene* and Mr. *Whitbread*, for the mortgagees.—There had been no tender, and it was admitted that no sum had ever been offered for costs; but if so, a mortgagee was not compelled to give up the estate till he was fully satisfied: *Davy v. Barker* (c), *Paynter v. Carew* (d), *Mathie v. Edwards* (e), *Anonymous* (f).

(a) 2 Beav. 70.
(b) 3 Atk. 89.
(c) 2 Atk. 2.

(d) Kay, App. 36.
(e) 2 Coll. 465.
(f) 6 Madd. 10.

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The VICE-CHANCELLOR :—

There are two questions raised in this suit, first, whether the mortgagee has used the power of sale oppressively, and secondly, whether the purchaser was so much a party to the transaction which is impeached, that, as against him, the sale must be set aside.

The defendants were distinctly informed on the 1st of April, that is five days before the sale, that the plaintiff was desirous of redeeming the property. It is not and cannot be pretended that this was other than *bonâ fide*, for from the beginning of the controversy down to the day of the sale there has been a struggle on the part of the plaintiff to recover this estate.

In reply to a letter from the plaintiff, the mortgagees, by their solicitor, wrote a letter which contains a suggestion of what was unfounded, and a statement of what was untrue. The statement that it would take 340*l.* to clear off principal, interest, and costs was not justifiable. The mortgage debt was only 250*l.* with a small arrear of interest, making together 261*l.*, and the right to tack could not be maintained, and has been very properly abandoned. But the effect of these misrepresentations was to deter the person seeking to redeem, by inducing him to believe that a larger amount was due than was in fact due. The course of conduct disclosed in this letter brings the case within the description given by Lord Hardwicke, in *Wiltshire v. Smith (a)*, of a certain class of practitioners. For after these misrepresentations the writer goes on to say, "My client intends to dispute your title to the equity of redemption, or to the surplus, if any, of the sale, upon grounds which, to say the least of them, appear to me valid." He could hardly say more. He adds, "And unless the assignee is arranged with, I can see no alternative

(a) 3 Atk. 89.

for my clients, the mortgagees, other than paying such surplus, if any, into the Court of Chancery under the Trustee Relief Act"—all which meant that there was to be a sale at all events, and that the plaintiff's title was to be disputed, and the surplus of an estate, mortgaged for 250*l.* and sold absolutely for 400*l.*, was to be paid into court.

The purpose of all this is perfectly clear: the defendants resolved that there should be no redemption, but that there should be a sale. This is precisely that of which the plaintiff complains, and which this Court, which alone recognises the right to redeem, must regard as oppressive. Before the surplus could be paid into court, there must necessarily be a sale, which could not be effected consistently with that redemption which the plaintiff desired.

Even if the case rested there, enough is proved to show such a settled determination to defeat, thwart, and discourage the redemption, that this Court is bound to regard with great jealousy any subsequent proceedings against the mortgagor's endeavour to redeem.

There is conflicting evidence whether the plaintiff actually tendered the amount of the debt; but it is certain that, some time before the sale, the plaintiff himself, and afterwards the solicitors' clerk, went to Mr. Williams, and, as they swear, offered 261*l.*, which was the amount estimated to be due, exclusively of costs. Mr. Williams, however, can recollect nothing of the interview, except that something was said about the sale, and he is sure there was no tender.

Upon the weight of evidence, it is proved that the sum of 261*l.* was offered by the plaintiff and refused by Mr. Williams. No sum was offered for costs, because they were not ascertained. The next day the property is offered for sale, and the mortgagor attends and endea-

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vours to prevent the sale. This power of sale could only properly be exercised by the defendant, in order to repay himself the amount of his debt. As to any surplus that might arise from a sale properly effected, after payment of his principal, interest, and costs, the defendant would be a trustee for the plaintiff, and bound to account. It is well settled that, though a mortgagee's power of sale confers a clear right, it must be exercised with a due regard to the purpose for which it is given. A mortgagee, with such a power, stands in a fiduciary character, and, unlike an ordinary vendor selling what is his own, he must take all reasonable means to prevent any sacrifice of the property, inasmuch as he is a trustee for the mortgagee of any surplus that may remain. Upon the weight of evidence in this case, I must hold that the power of sale was oppressively exercised, because, after the plaintiff had offered to pay the principal and interest, the defendant persisted in his determination to sell.

It is not seriously contended—at least there is no evidence to show—that there was any doubt about the payment. The whole object seems to have been to have a sale at all hazards, and to pay the surplus monies, if any, into court, under the Trustee Relief Act. As regards the mortgagee, therefore, I must hold that the sale was oppressive, and must be set aside, if it can be done, without injustice to the purchaser.

The purchaser contends that, as a *bonâ fide* purchaser for value under a power of sale so framed as to relieve him from the duty of making any inquiry, he is entitled, according to the rules of this Court, to hold the property against all claimants. But, although a power of sale so framed relieves the purchaser from all obligation to make inquiries, yet the terms in which this clause is expressed would seem to show that, though a purchaser under a power

of sale need make no inquiries, yet if circumstances which put in question the propriety of the sale are brought to his knowledge, and he purchases with that knowledge, he becomes a party to the transaction which is impeached. In this case the purchaser was present, and saw the struggle to redeem, and he must have known that the effect of his act would be to destroy that right to redeem which the plaintiff was endeavouring to establish while the sale was pending. This knowledge on the part of the purchaser puts him in exactly the same situation as the persons from whom he was about to purchase. There seems nothing to relieve the purchaser from the consequences of this proceeding to complete his purchase in the face of what ought to have put him on inquiry. It is said, and truly said, that had he seen nothing, he need not have made any inquiry; but, having been a witness to what was going on, he became in one sense a party to the transaction, and cannot now rely on the immunity given by the deed in favour of an indifferent purchaser. In other words, the purchaser having seen the struggle to redeem, and heard the plaintiff's claim, proceeded at his peril.

But it was said that the plaintiff, by serving the notice on the purchaser claiming the purchase-money, has adopted the sale; but, looking at the time and circumstances when that notice was given, it is clear the plaintiff intended to waive no right he might possess to set aside the sale.

Then it is said that, the bill being filed twelve months after the date of the sale, the plaintiff comes too late; but it is impossible to define the time within which a plaintiff must come to the Court to redeem his estate on peril of losing his remedy. The time must depend on the circumstances of the case.

On the whole case, I must consider the sale oppressive

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and invalid as against the mortgagor, and it must be set aside.

The decree must be as follows :—

“ Declare that, having regard to the circumstances, the sale is invalid, and that the same ought to be set aside. Ordered, that an account be taken of what is due to the defendants Williams and Llewellyn for principal, interest, and costs, as mortgagees on their mortgage debt of 250*l.*, and ordered that such amount be paid by the plaintiff within three calendar months from the date of the Chief Clerk’s certificate to the defendant Arthur Jones. Thereon, ordered, that Jones do convey and assign the mortgaged premises to the plaintiff. Refer it to Taxing Master to tax the plaintiff’s costs of this suit, and order same when taxed to be paid by defendants Williams and Llewellyn to plaintiff. Ordered, defendant not to take proceedings on judgment at law.

“ Reg. Lib. A. 469, 470, 17th Feb., 1860.”

1859.
 Nov. 25th,
 Dec. 2d.

FUTVOYE v. KENNARD.

A plaintiff in contempt is entitled to be heard on his motion to discharge an order made against him at chambers.

IN this case, Mr. *Bacon* and Mr. *Tripp*, on behalf of the plaintiff, moved to discharge an order made by his Honour at chambers, authorising the defendant Wesley to let a space in the Crystal Palace Bazaar, at a rent which the plaintiff contended was insufficient. The bill was filed to enforce certain agreements as to the construction of the Crystal Palace, and charged the receiver Wesley with acting in the interest of the other defendants, and with

excluding the plaintiff from the management, in contravention of the agreement; and it prayed that Wesley might be removed from his office.

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Argument.

Mr. *Malins* and Mr. *H. Stevens*, for the defendant, took a preliminary objection to the motion, that the plaintiff being in contempt for non-payment of the costs of a motion, which had been refused with costs, could only be heard to purge his contempt.

Mr. *Bacon* and Mr. *Tripp* contended that, although the plaintiff was in contempt, he was entitled to be heard against an order which had been made adversely to him.

[They cited *Ricketts v. Mornington* (a), *Wilson v. Bates* (b), *Cattell v. Simons* (c), *Bickford v. Skewes* (d), *Morrison v. Morrison* (e), *Bristowe v. Needham* (f), *Ex parte Chadwick* (g).]

The VICE-CHANCELLOR said he thought the objection could not be maintained; on which the plaintiff's counsel, after that intimation, declined to press the objection further. The motion was then heard and refused by his Honour.

Judgment.

(a) 7 Sim. 200.

(b) 9 Sim. 54; 3 M. & C. 197.

(c) 5 Beav. 396.

(d) 10 Sim. 193.

(e) 4 Hare, 590.

(f) 2 Phill. 190.

(g) 15 Jur. 597.

1860.

Jan. 31st.

WATTS v. CAMPBELL.

Trust monies
settled on such
trusts as the
plaintiff
should by
deed or will
appoint,
ordered to be
paid the
plaintiff.

THIS was a bill to recover the sum of 1000*l.*, to which the plaintiff claimed to be entitled. When recovered, the money was to be held on such trusts as she should by deed or will appoint.

Mr. *Lindley*, for the defendant, submitted to pay the amount as the Court should direct.

Mr. *Archibald Smith* asked that the money might be paid to the plaintiff herself, and cited *Sugden on Powers*(*a*).

Mr. *Lindley*, for the defendant, submitted the matter to the Court.

Judgment.

The VICE-CHANCELLOR made the order as asked.

[See *Routledge v. Dorill*(*b*).]

(*a*) Vol. 2, 7th ed., p. 117.

(*b*) 2 Ves. 357.

DILKES v. BROADMEAD.

1860.

March 8th.

IN 1822, one Henry Hewitt demised to Capt. Dilkes, R.N., since deceased, a messuage and dwelling-house, in the City of Cork, for the term of 9000 years, from Michaelmas, 1821, at the rent of 5*l.* per annum.

In 1828, Capt. Dilkes, in consideration of 100*l.*, demised the premises to one James Bucknell, for 8000 years, at the same rent.

In October, 1846, Capt. Dilkes died, leaving Charles O. B. Dilkes his sole personal representative.

James Bucknell, by his will, dated the 15th of June, 1829, bequeathed to his brother, William Bucknell, all his monies, &c., on trust, to invest the said monies, and to pay the dividends thereof for the maintenance and education of his daughter Harriett until she should attain twenty-four, or marriage, with his consent, previously obtained in writing. And upon further trust, to pay and assign the said monies and the accruing interest and accumulations to his said daughter, on her attaining twenty-four, or being married with such consent as aforesaid.

On the 16th of August, 1848, Harriett Bucknell, being under twenty-four years of age, but with the consent of the trustees, married the defendant Broadmead, and on and in consideration of her marriage the sum of 12,500*l.* Bank Annuities was settled on trust for the husband for life, the wife for life, with remainder among the children of the marriage. A further sum of about 5,000*l.* was also settled on trust during the lives of the husband and wife, for the separate use of the wife, remainder to herself for life in case she survived her husband, with power, in case she died in his lifetime, of appointing the fund by will.

Assets of a testator, settled *bona fide* on the marriage of the residuary legatee, are no longer liable to the claims of creditors. Therefore, a bill filed against the residuary legatee and the trustees of the settlement to recover the amount paid by the plaintiff by reason of the testator's breach of the covenants in a lease, was dismissed with costs.

Spackman v. Timbrell (a), considered.

(a) 8 Sim. 253, 260.

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 Statement.

In April, 1856, Thomas H. Hewitt, the residuary legatee of Henry Hewitt, preferred a claim against the plaintiff as representative of Captain Dilkes, for one year's rent due in March, 1856, and for a breach of covenant to repair.

The plaintiff thereupon filed this bill against Mrs. Broadmead (as the representative of James Bucknell) and her husband, and by amendment against the trustees of the marriage settlement, charging that the estate of James Bucknell was liable in this court for the breach of the covenant contained in the indenture of the 31st of July, 1828. The bill averred that the stock and securities comprised in Mrs. Broadmead's settlement were the produce of James Bucknell's estate.

The bill prayed for an account of the damage sustained by the breach of covenant to repair, and of the rent, and that the defendant might be decreed to pay such amount personally.

There was added by amendment a prayer in the alternative that such payment might be ordered to be made out of the funds comprised in the marriage settlement, or at all events out of so much as was settled to her separate use, or out of so much thereof as was derived from the estate of the said James Bucknell.

The bill also prayed for all proper directions, and that the defendant might admit assets.

Argument.

Mr. Bacon and Mr. Hingeston, for the trustee.—In the case of *Davies v. Nicholson* (a) the Lords Justices held that a creditor was entitled to proceed against a specific legatee to be recouped for the loss occasioned by a breach of covenant, though there were general assets. In *Gillespie v. Alexander* (b) the case was incumbered with the difficulty that there had been part payments to legatees, but here the whole assets of the testator were

(a) 2 De G. & J. 693.

(b) 3 Russ. 130.

in the hands of the residuary legatee and those who represent her.

At all events, the plaintiff is entitled to relief against that part of the assets which were settled to the separate use of Mrs. Broadmead. [*Bovey v. Smith* (a) was cited.]

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Argument.

Mr. *Malins* and Mr. *Schomberg*, for the defendants.

The case of *Spackman v. Timbrell* (b) is not in principle distinguishable from the present case; and there is nothing in the case of *Davies v. Nicholson* inconsistent with that decision.

In this case, there is the additional circumstance that the assets have been *bonâ fide* settled in a marriage settlement, and cannot be reached, except, perhaps, in a case of fraud: *Campion v. Cotton* (c), *Ex parte McBurnie's Trustees* (d).

A purchaser of a legacy which has been paid, cannot be called on to refund or pay any portion of a debt subsequently established against a testator's estate: *Noble v. Brett* (e).

Richardson v. Horton (f), and *Pimm v. Insall* (g) were also cited.

The VICE-CHANCELLOR:—

This case is clearly within the principle of *Spackman v. Timbrell* (h), and is also within the doctrines stated by the learned judges who decided the cases of *Pimm v. Insall* (i), *Richardson v. Horton* (j), and the other cases, particularly that of *Noble v. Brett* (k), before the Master of the Rolls.

Judgment.

(a) 1 Vern. 144.

(b) 8 Sim. 253.

(c) 17 Ves. 263.

(d) 1 De G. M. & G. 441.

(e) 24 Beav. 499.

(f) 7 Beav. 112.

(g) 1 M. & G. 449.

(h) 8 Sim. 253.

(i) 1 M. & G. 449.

(j) 7 Beav. 112

(k) 24 Beav. 499, 511.

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There is no imputation as to the honesty with which the assets were dealt with, and it is clear that they might have been reached, if they had passed into the hands of a volunteer. But having been transferred to the possession of trustees upon the marriage of the defendants, upon the trusts of the settlement, they are protected by the consideration of marriage; and, without overruling the case of *Spackman v. Timbrell*, it will be impossible for me to grant the plaintiff the relief which he asks, or to allow him to follow the assets. As to the restricted part of the relief which is asked, viz., that the plaintiff may be allowed to claim the money against the separate estate of Mrs. Broadmead, the proposition is in itself contradictory. That can only be done under the trusts of the settlement; and if this property is protected by the trusts of the marriage settlement, it cannot be said that this claim can be established against those assets when the whole fund is protected by the consideration of marriage. On looking at the case of *Davies v. Nicholson* (a), I find, that, by the decree, the specific legatee was to be at liberty to file a bill against the person who had received the general personal estate of the testator, in order to establish his right to be repaid what should be raised by sale or mortgage of the estate specifically bequeathed. The Lords Justices in that case made reference to *Gillespie v. Alexander*, and to *Greig v. Somerville* (b), and it is to be inferred, from what was said, that they would have allowed the decree in *Davies v. Nicholson* to stand, if the case of *Greig v. Somerville* had governed it.

It is clear, however, that the specific legacy could not be touched until the general estate was exhausted.

In this case the plaintiff is clearly wrong, and the bill must be dismissed with costs.

(a) 2 De G. & J. 693.

(b) 1 Russ. & M. 338.

PAGE *v.* BENNETT.

1860.

March 20th.

THIS bill was filed under the 22d & 23d Vict. c. 35 ('Lord St. Leonards' Act), in order to obtain relief against a breach of covenant to insure against fire.

By an indenture dated the 28th of September, 1854, Charles Perrin demised to George Bennett, the defendant, certain houses at Norwood for a term of ninety-nine years from Christmas, 1852. By the same instrument, Bennett covenanted with Perrin "to insure the premises against damage from fire in the joint names of Charles Perrin, his executor or executors, and of George Bennett, his executors, administrators, and assigns."

George Bennett granted an underlease of the houses, dated the 8th of December, 1854, to Thomas Marsden for the residue of the term, wanting twenty-one days; and Thomas Marsden covenanted for himself, his executors, administrators, &c., with George Bennett that he would insure the premises in some fire insurance office, to be approved of by Bennett, his executors, administrators, and assigns, in the joint names of Thomas Marsden, his executors, administrators, or assigns, George Bennett, his executors, administrators, or assigns, and Charles Perrin, his heirs and assigns.

On the 29th of September, 1858, the houses, with the approval of Bennett and Charles Perrin, were insured against loss by fire in the joint names of Perrin, Bennett, and a person who was an assignee of Marsden.

On the 8th of February, 1859, Marsden assigned his interest in the premises to Charles Henry Page.

The premium was payable on the 29th of September, 1859, by the plaintiff, but was not paid. The plaintiff alleged that, two or three days before the premium was

The Court has jurisdiction to relieve against a breach of covenant to insure committed after the date of the Act, 22 & 23 Vict. c. 35, arising on a lease dated before the passing of the Act.

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due he directed his son to call and pay it, but his son had forgotten to do so. In November, 1859, the plaintiff sent his son to the office to pay it, when he found it had been already paid by Charles Perrin, who held some office in the company.

On the 30th of December, 1859, the defendant Bennett served the tenants with proceedings in ejectment, to which the plaintiff appeared, and filed this bill, alleging that he had no defence at law; that no loss or damage by fire had been sustained; and that the breach of covenant had been committed "through accident, or mistake, or otherwise, without fraud or gross negligence." The bill went on to pray that, under the circumstances aforesaid, the defendant Bennett might be restrained by injunction from prosecuting the said action, and that the plaintiff might be relieved against any forfeiture of the said premises which might have accrued from the breach of the covenant to insure contained in the said indenture of the 8th of December, 1854, upon such terms as the Court might think fit.

George Bennett, in his answer, deposed that he had understood that the plaintiff had endeavoured to induce Perrin, the ground landlord, to bring an ejectment against him, Bennett; but this was explained by the plaintiff, that this was done merely to stop Bennett's action of ejectment against the plaintiff.

Argument.
—

Mr. Malins and Mr. Schomberg, for the plaintiff.

The language of the statute was express, and the plaintiff was clearly within the terms of the fourth section (a).

(a) The 22 & 23 Vict. c. 35, enacts as follows:—

Sect. 4. "A Court of equity shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against

loss or damage by fire where no loss or damage by fire has happened; and the breach has, in the opinion of the Court, been committed through accident, or mistake, or otherwise, without fraud

It would be contended that Vice-Chancellor Kindersley and the Master of the Rolls had decided that this Act was not retrospective. Here the covenant was before, but the breach was after, the passing of the Act.

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The decision of the Master of the Rolls was on the 32d section of the Act (*a*), and that of Vice-Chancellor Kindersley (*b*) substantially on the 27th section. This question turned on the fourth section, and might well be retrospective, though other provisions of the Act were not.

Mr. Bacon and Mr. Boyle, for Bennett.—It was quite clear the Act never intended to take away any existing rights, and it was expressly on that ground that the Vice-Chancellor Kindersley held not that any particular section, but that the whole Act was not intended to have a retrospective effect.

The VICE-CHANCELLOR:—

This case is within the 4th section of the Act of last session. It has been argued that the 4th section does not apply to any lease in existence at the time of the passing of that Act; and if that be a correct view, it would follow that the Court has no power to grant relief for breaches of covenant accrued after the

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or gross negligence, and there is an insurance on foot at the time of the application to the Court, in conformity with the covenant to insure, upon such terms as to the Court may seem fit."

Sect. 5. "The Court where relief shall be granted, shall direct a record of such relief having been granted, to be made by indorsement on the lease, or otherwise."

Sect. 6. "The Court shall not have power under the Act to re-

lieve the same person more than once, in respect of the same covenant or condition, nor shall it have power to grant any relief under this Act, where a forfeiture under the covenant in respect of which relief is sought, shall have been already waived out of Court in favour of the person seeking the relief."

(a) 26th Nov., 1859, *Re Miles*.

(b) 10th Feb., 1860, *Dodson v. Sammel*.

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Act, under leases granted before the Act, because the covenants were entered into before the Act was passed. But that construction seems to me inconsistent with the language of the Act of Parliament, and with the scope and object of the Act.

The object of the Act of Parliament is to give a particular power and jurisdiction to this Court, which it had not before. There are no words to limit the operation of the Act as to this jurisdiction. The Court, whenever it finds such a breach of covenant as is mentioned in the Act, is at liberty to use the power to give equitable relief where the circumstances of the case are such as to justify it.

The question, therefore, is, whether in this case, a breach of a covenant to insure has been committed under such circumstances that the Court ought to grant relief.

The Act says that this relief is to be granted when, in the opinion of the Court, the breach has been committed "through accident or mistake or otherwise, without fraud or gross negligence."

Fraud is out of the question in this case. Negligence there has been, undoubtedly; but it is necessary to consider, whether the negligence has been so gross that the Court has no power under the Act to give relief against it. The insurance should, strictly, have been effected upon the 29th of September, but it might have been effected without any breach of covenant between that date and the 15th of October. The plaintiff has stated the circumstances under which the failure to effect the insurance took place. He alleges that it escaped his memory, and that when the matter was brought to his recollection, he desired his son, who had the money, to go and pay the premium. The son neglected to do so. On the 15th of November, a month after the proper time, the ground landlord (Perrin) paid the premium at the office, of which it appears he is the agent.

But, considering that the policy has been kept on foot by payment of the premium within a month after the proper time of payment, by a person who has no wish to take advantage of the breach—looking at all these circumstances, it is, I think, too much to say there has been such a degree of gross negligence as to prevent the plaintiff from having relief against the breach of the covenant. On the contrary, looking at all that has passed between the parties, I think they have dealt with this property in such a way as that a case of gross negligence cannot be made out, and the plaintiff is consequently entitled to relief. Mr. Snow, the defendant's solicitor, has made a statement which might have introduced a very unfavourable feature into the plaintiff's case, viz., that the defendant, Bennett, being under-lessee, and also the lessor of the plaintiff, the plaintiff having broken his covenant with Bennett, suggested to Mr. Perrin to take advantage of that breach and oust his, the plaintiff's, lessor. But when the truth is looked at, it appears that the suggestion was made in order to relieve the plaintiff from the action brought by Bennett for the breach of covenant. The suggestion was that Mr. Perrin should bring an action unless Bennett agreed to stay his action. Unfortunately, an expensive suit has been made out of a trifling matter.

The Act of Parliament says that the Court shall give relief in certain cases, and in doing so may impose terms.

One term to be imposed upon this plaintiff must be, that he must pay all Bennett's costs which have been incurred at law. I should have been disposed to add to that the costs of this suit; but, looking at the course which the litigation has taken, and the defence which has been made, I cannot consider that the questions raised by the defendant are proper.

Therefore I cannot impose as a term upon the plaintiff

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that he should pay the defendant's costs. The defendant must pay his own costs. Declare that the plaintiff is entitled to be relieved upon the terms of paying the costs of Bennett in the action at law, and that in this suit each party must pay his own costs.

March 23d. **Re THE TRUSTS OF ABRAHAM WARD'S
WILL, AND THE TRUSTEE RELIEF ACT.**

Upon a petition for payment out of court of a share in a fund standing to a general account in which infants are interested: *Held*, that a guardian *ad litem* of the infants must be appointed, on whom the petition must be served.

UNDER the will of Abraham Ward, his real and personal estates in the events that happened became divisible among the brothers and sisters of his daughter Elizabeth, who should be living at the death of his grandchild Louisa Elizabeth Ruet, and their children.

Louisa E. Ruet died in February, 1843, at which time John Ward had three children, Emily, John the younger, and James. Afterwards, he had six more children. James died subsequently, and also one of the six later born children.

On the 8th of March, 1852, John Ward paid into court of monies belonging to the testator 513*l.* 7*s.* 5*d.*, and 103*l.* 10*s.* 6*d.*, which he held on the trusts of the will.

On the 8th of January, Emily Ward attained twenty-one, and presented a petition to the Court claiming one-third part of the fund; the mother of James Ward, the infant, also claimed a third.

There was a question whether the six children of John Ward, born after the death of Louisa Elizabeth Ruet, were not entitled to a share in the fund.

Mr. *Martindale* appeared on the petition, and stated to the Court that a question would arise as to the right of the after-born children of John Ward to participate in that legacy. In that case it was a question whether a guardian of the infants *ad litem*, on whom the petition should be served, ought not to be appointed.

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Argument.

The VICE-CHANCELLOR said, in order that good service upon the children of John Ward born after Louisa E. Ruet's death might be effected, it would be necessary to have a guardian *ad litem* appointed; but as it would be desirable to have a uniform practice, he would consult the other judges on the point. His Honour, on a subsequent day, stated that he had consulted the Master of the Rolls and Vice-Chancellor Wood, and they were both of opinion that, in a case of this kind, a guardian *ad litem* of the infants ought to be appointed.

Judgment.

1860.

March 16th.

HICKMAN v. UPSALL.

Gift by a testatrix to trustees, of a debt of 1000*l*. on trust to invest the same in stocks or real securities, and to stand possessed of the debt, and interest, and of the stocks, funds, and securities, on trust thereout to pay the plaintiff an annuity of 30*l*. and to pay three-fourths of the residue of the interest or dividends received from the said debt, or the investment thereof, to his daughter Mary; and after plaintiff's death he gave four tenths of the debt of 1000*l*. to his daughter Mary.

By his codicil, the testator revoked the gift of four-tenths of 1000*l*., and gave instead thereof three-tenths of the debt, on the same trusts as the four-tenths. —

Held, that the annuity was a charge on the capital of the debt of 1000*l*.

JOHN HICKMAN, by his will, dated the 16th of January, 1851, after directing payment of his debts and making certain bequests, gave and bequeathed to Thomas Upsall and his son-in-law, Pask Jackson, a debt or sum of 1000*l*. sterling, due and owing to him by his son Robert Upsall, together with all securities for the same; and he authorised and empowered the said Thomas Upsall and Pask Jackson, and the survivor of them, to give his said son Robert such time for the payment of the principal of the said debt, and to permit the same or any part thereof to remain outstanding for such period or periods, and upon the present or any future security as they or he should in their or his discretion think fit, it being his will that his said son Robert should not be injured by the sudden calling in of the principal of such debt, unless such circumstances should occur which, in the judgment of the said trustees or trustee, should render the speedy calling in of the same expedient. And he directed that if the principal of the same debt or any part thereof should be called in or paid, the same should be forthwith invested by the trustees or trustee for the time being of that his will in their or his names or name in the public stocks or funds, or upon government or real securities, at interest; and he further directed that his said trustees or trustee should stand possessed of the said debt, and of the interest to accrue due thereon from his decease, and also of the said stocks, funds, and securities, upon trust thereout to pay unto his daughter, the plaintiff, the yearly sum of 30*l*. by quarterly payments, the first payment thereof to be made at the expiration of three calendar months next after his decease, for her own absolute use

during her life. And upon trust to pay into the proper hands of his daughter Mary Jackson, wife of the said Pask Jackson, during the life of the plaintiff, three fourth parts of the residue of the interest or dividends to be received from the said debt or the investment thereof, for her separate use, free from the debts, control, or engagements of her then present or any future husband, and her receipt alone and only from time to time to be a sufficient discharge for the same, and during the life of the plaintiff to pay the remaining one-fourth part of the said interest or dividends unto his son Thomas Upsall for his use; and from and after the decease of the plaintiff, he gave and bequeathed to his said son Robert one-half of the said debt, or the investment thereof, for his absolute use; he gave and bequeathed one-tenth part thereof to his said son Thomas, for his absolute use, and he directed his executors to stand possessed of the remaining four tenth parts thereof, upon trust to pay the interest, dividends, or annual proceeds thereof, into the proper hands of his said daughter Mary Jackson, during her life, for her separate use, free from the debts, control, or engagements of her then present or any future husband, and her receipt alone and only to be a sufficient discharge for the same; and from and after her decease, upon trust as to the said four tenth parts of the said debt, or the investment thereof, to pay and transfer the same unto and amongst all and every the children of his said daughter who should survive her or should die in her lifetime leaving issue, in equal shares and proportions; and he gave and bequeathed all that his leasehold messuage or tenement and premises, No. 14, Mount Terrace, New Road, Whitechapel, Middlesex, unto his said son Thomas Upsall, and the said Pask Jackson, their executors, administrators and assigns, for all his estate, term, and interest therein, upon trust from time to time to receive the rent and profits thereof, and, after payment of ground

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rent and all other outgoings and disbursements, to pay the clear residue thereof as the same should become due, and not by anticipation, unto or permit the same to be received by his said daughter, the plaintiff, Sophia Upsall, during her life, for her own sole and separate use, free from the control, debts, and engagements of any husband with whom she might intermarry, and so that she might not alien or anticipate the same, and for which her receipt alone, signed with her own hand after such rents should become due, should be a good and sufficient discharge.

The testator made a codicil to his will, dated the 13th of November, 1851, by which he revoked the bequest to his executors of four tenth parts of the sum of 100*l.* owing to him by his son Robert, in trust, after the decease of his daughter, the plaintiff, for his daughter, Mary Jackson, and her children, and instead thereof he gave to his executors three tenth parts of such debt, upon the same trusts as were in his said will declared concerning the said four tenth parts thereof; and instead of one-half of the said debt by his said will given to his son Robert after the decease of his said daughter, the plaintiff, he gave to his said son Robert six tenth parts thereof; and he revoked the bequest to his son John of the sum of 40*l.*, and instead thereof he gave to his said son the sum of 6*l.*; and in all other respects he confirmed his said will.

The testator died shortly after the date of the codicil. The executors proved the will, but, as alleged by the bill, had not put out and invested the sum of 1000*l.*

The question now raised was, whether the annuity of 30*l.* was charged on the capital fund, or only on the interest.

Argument.
 —

Mr. C. T. Simpson for the executors of Robert Upsall.
 Mr. Cutler for the executors of the testator.

The whole fund is given to the trustees, and then

follows the direction to pay the annuity; after which the testator proceeds to dispose of the whole fund. It is clear, therefore, his intention was that the annuity should be paid only out of the interest. In the recent case of *Baker v. Baker* (a), a testator directed his executor and trustee to get in his estate, and to stand possessed of the produce thereof, on trust to raise thereout, and to invest in the stocks, or upon mortgage, such a sum of money as, when invested, should realise a clear annual income, and to pay to his wife such dividends, interest, or annual income; and, on her death, to stand possessed of the money and stocks in which the same might be invested on certain trusts. Then followed a direction as to the "residue," after raising thereout sufficient to pay the annuity. The House of Lords held the widow was not entitled to have the annuity made good out of the *corpus*.

In *Foster v. Smith* (b), there was a devise of real estate, on trust to receive the rents and to pay thereout an annuity to the testator's widow, and, after her decease, to convey the estate; but it was held, reversing the decree of Vice-Chancellor Knight Bruce (c), that the annuity was a charge only on the rents.

Mr. Bacon, Q.C., and Mr. Hallett, for the plaintiff.

The direction in the will is, that the trustees are to stand possessed of the said debt and of the interest to accrue thereon, and also of the said stocks, funds, and securities, upon trust thereout to pay the annuity. These words are nearly the same as those in the case of *Wright v. Callender* (d), where the Lords Justices held, reversing the decision of Vice-Chancellor Kindersley, that the annuitant was entitled to have a deficiency that existed made good out of the residue. There was a residuary gift in that case, as in this. The words in both cases are,

(a) 6 Ho. Lds. 616.

(b) 1 Phill. 629.

(c) 2 Y. & C. 193.

(d) 2 De G. M. & G. 652—8.

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on "trust thereof;" and here there is a clear intention to give over only what should remain after satisfaction of the annuity.

The true criterion is—does the testator mean to give an annuity, or only the produce of a sum of money directed to be set apart?

In the codicil the testator calls the subject matter the debt, but he also calls it the 1000*l.*, and does not alter any of the trusts created by the will except as to amount.

Boyd v. Buckle(a) was also cited.

See also *May v. Bennett*(b), *Davies v. Wattier*(c), *Hodge v. Lewin*(d).

Judgment.

The VICE-CHANCELLOR:—

In the trust which directs payment of this annuity, the testator in the clearest and most impressive language directs not only the debt and interest, but also the stocks, funds, and securities to be held in trust to pay the annuity. Unless there be something in the will to control this language, the capital as well as the interest of the whole trust fund is applicable to make good the annuity.

The subsequent words are by no means clear. They are said to contemplate the event of the interest being more than enough to make good the annuity, because the words are: "Upon trust to pay into the proper hands of my daughter Mary Jackson, during the life of the plaintiff, three-fourth parts of the residue of the interest or dividends to be received from the said debt, or the investment thereof."

But these words relate to that which was not the subject-matter of the former gift.

The difficulty arises from this, that one part of the debt, or of the investment thereof, is to be paid to one

(a) 10 Sim. 595.

(b) 1 Russ. 370.

(c) 1 Sim. & St. 463.

(d) 1 Beav. 431.

individual object of the testator's bounty, and the other part to another. The word "residue" must be taken to refer to the whole investment.

It has been said, upon the authority of the case of *Baker v. Baker*—reading the codicil and the will together—that there was so clear a gift of a particular sum of money to be invested, that it is impossible to defeat that gift of a particular sum of money by taking any part of the capital to make good the annuity. But, by the codicil, the testator did not intend to alter the subject-matter of the gift at all; he only wished to alter the proportion of the gift which Robert was to take—namely, six-tenths instead of one-half. He has called it indeed a "debt," but he means the same thing as "the debt and interest" spoken of in the will. I cannot consider that, upon the authority of *Baker v. Baker*, I am authorised to say when the testator has directed that the capital is to go in payment of this annuity, that the subsequent words can control the intention which he has so clearly expressed by the former words. I must, therefore, order a sufficient sum to be set aside out of the fund to provide for the plaintiff's annuity.

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—
Judgment.

1860.

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 & 20th.

PEARMAIN v. TWISS.

The Wills Act, 1st Vict. c. 26, has not altered the rule of law that every devise of real estate, though in terms residuary, is, in fact, specific.

HENRY THEOBALDS, by his will, made the following disposal:—

“First, I give and devise all my estates situate at Ashwell, in the county of Hertford, and all my leasehold and other estates in London, or in the county of Middlesex, to my beloved wife Rebecca Theobalds, her heirs, executors, and administrators absolutely; and I give, devise, and bequeath all other my freehold, copyhold, and leasehold estates unto my said beloved wife Rebecca Theobalds, for and during the term of her natural life, without impeachment of waste; and from and immediately after the decease of my said wife I give, devise, and bequeath all my said last-mentioned freehold, copyhold, and leasehold estates in manner following, that is to say, I give, devise, and bequeath all my freehold, copyhold, and leasehold estate at Brookend, in the parish of Steeple Morden, in the county of Cambridge, or elsewhere in the said parish of Steeple Morden, except the copyhold estate in Steeple Morden which I lately purchased of Pearce Janeway, unto my nephew William Theobalds, his heirs, executors, and administrators; also I give to my said nephew William Theobalds all the corn which shall be growing at my decease on the land above devised to him, and all the corn which shall be in the barns of the estate above given to the said William Theobalds at the time of my decease, and the straw and dung thereof; also I give and devise all my said copyhold estate in Steeple Morden aforesaid, which I lately purchased of Pearce Janeway, and all my freehold, copyhold, and leasehold estates at Guilden Morden aforesaid, unto my

nephew Abraham Pearmain, his heirs, executors, and administrators."

The testator then gave several pecuniary legacies, and gave to his "beloved wife absolutely" his furniture, household stores, plate, clothes, linen, and china, his old pony, gig, and poultry, and proceeded as follows:—

"Also I give and bequeath all the rest and residue of my goods, growing crops; stock crop, mortgages, monies, securities, and personal estate at my decease unto my said nephew Abraham Pearmain, his executors, administrators, and assigns, subject to the payment of my just debts, funeral and testamentary expenses, and all the before-mentioned legacies and annuity, which legacies and annuity are to be payable at the end of three months after the decease of the survivor of me and my said wife, and shall also be a charge on my real estate in aid of my personal estate, and my wife shall be exonerated at the expense of my residuary legatee from all charges upon or in respect of her life interest in my real estate. And I appoint my said beloved wife Rebecca Theobalds, my brother-in-law William Thompson, of Ashwell, in the county of Hertford, and my said nephew Abraham Pearmain, executors of this my will, and I give them all estates vested in me as mortgagee or trustee, but the money secured on such mortgages shall go as part of my personal estate. And I revoke all former wills by me made."

The testator died on the 12th of November, 1843, leaving his widow him surviving. Abraham Pearmain and William Thompson proved his will.

At his death the testator was entitled to estates in fee simple at Ashwell, which were of freehold tenure and free from incumbrance. He had also estates at Brookend, Steeple Morden, and Guilden Morden, which were incumbered.

The widow died on the 22d of May, 1857.

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Statement.

The executor Thompson died in the lifetime of the widow.

The bill was filed by Abraham Pearmain, the surviving executor, and it charged that the executors had paid debts, &c. exceeding the personal estate.

The 23d paragraph was as follows:—

“The plaintiff also charges that the said sum so paid by the plaintiff for the principal of the said several legacies, with interest thereon at 4l. per centum per annum, from the 22d day of August, 1857, together with the plaintiff’s costs, charges, and expenses, properly incurred in and about paying the said legacies, is a charge on the whole of the real estate of the testator, and that the plaintiff is entitled to a charge on the said estate at Ashwell, and on the said hereditaments at Steeple Morden devised to the said William Theobalds, for so much thereof as shall be to the whole thereof in the same proportion which the value of the said hereditaments bears to the value of the whole of the real estate of the testator; and that the said unpaid legacies ought to be raised rateably out of the whole of the real estate of the said testator, and paid or secured for the benefit of the said legatees; and that, in estimating the value of such real estates, the mortgage debts charged on the said real estates respectively, or any part thereof respectively, should be deducted.”

The bill prayed—

That an account might be taken of the personal estate of the testator, not specifically bequeathed, come to the hands of the plaintiff, and of his debts, &c.; and in case, on taking such account, a balance should be found due to the plaintiff, that such balance, with interest, might be raised rateably out of the real estate of the testator, and out of the personal estate specifically bequeathed.

That so much of the legacies as were unpaid might be raised rateably out of the real estate devised by the

said testator, after deducting the charges on the real estate, &c.

Mr. *Bacon*, Q.C., and Mr. *A. Smith*, appeared for the plaintiff.

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Mr. *Giffard*, Q.C., and Mr. *Bathurst*, for the devisee of the widow.

The Ashwell estate was specifically devised, and neither that nor the specifically devised personal estate can be resorted to while the residuary real estate remains unadministered. Under the old law, "there was no distinction between a specific and a residuary devise;" but the new Wills Act having removed the ground on which that rule of law was based, by making the will speak from the death, Vice-Chancellor Kindersley, in a recent case, had decided that real estate, passing under a residuary devise, must be applied in payment of debts before the personal estate specifically given. [The VICE-CHANCELLOR:—Every devise of land is necessarily specific, from the nature of the subject-matter; it has a locality, which personalty has not.] Leasehold estate also has locality, but it is personalty. [The VICE-CHANCELLOR:—Leasehold estate also has locality, certainly, but having been held to be personal estate, it does not pass specifically, but generally with the bulk of the personal estate, unless given specifically. Any other chattel may be given specifically.] When the will could only operate on the real estate which the testator had at the date of it, a residuary devise was necessarily specific, because it was as much defined as that described in terms, but now that the will speaks from the death, a residuary devise no more defines the real estate on which the will may operate than is done by a gift of residuary personal estate. On that ground, Vice-Chancellor Kindersley, in the case of *Dady v. Hartridge* (a), and the

(a) Not reported.

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Master of the Rolls, in the case of *Rotherham v. Rotherham* (a), held that the effect of the statute of the 1st Vict. c. 26, had been to alter the course of administration. [The VICE-CHANCELLOR:—The Master of the Rolls, in *Rotherham v. Rotherham*, proceeded solely on the authority of *Dady v. Hartridge*.]

Mr. Walker and Mr. Pryor, for the defendant William Theobalds.

It was not the intention of the Legislature, by the Wills Act, to alter the course of administration; nor did it necessarily follow, because one ground on which the old rule was in part founded was removed, that the rule was changed.

If it was intended to alter the rule of law, the Legislature would have adopted a specific enactment for the purpose.

But this branch of the Court had already decided that the rule had not been altered by the new Wills Act. In *Eddels v. Johnson* (b), the Vice-Chancellor said, “ I do not understand the late Wills Act to have made any change in the law which made real estate assets for the payment of debts. The Act 3d & 4th Will. 4, c. 104, says that all lands are to be assets, whether in the hands of the heir or devisees; but I am asked to hold that one part of the real estate is not to be charged with debts; and reference is made to cases in which the testator has charged his legacies on his real estate. There is no analogy between the two things. I understand it to be completely settled that every devise of real estate, whether particularly described or residuary, is specific, and that in a case where the will contains no charge of debts on the real estate, and where there are specific gifts of realty and personalty, and also a gift of residuary real estate, that the real

(a) 28 Beav. 465.

(b) *Ante*, Vol. i. 29.

and personal estate must contribute rateably to the payment of debts."

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In *Emus v. Smith* (a) it was clearly the opinion of Vice-Chancellor Knight Bruce that the rule of administering assets had not been altered, though it was not necessary in that case for his Honour to determine the question.

It was at all events desirable that there should be a uniform rule in all branches of the court (b).

The VICE-CHANCELLOR:—

Judgment.

The two authorities which have been cited would, in the usual course, have settled this question. But, in my opinion, there is a great principle involved in it. Land cannot be generalised like personal estate. No one piece of land can represent another piece of land; therefore, a devise of land—whether in general terms as a residuary devise, or particularly mentioned—is specific, by reason of the peculiar and specific nature of landed property. There is no doubt as to the old doctrine on this subject. In the case of *Milnes v. Slater* (c), Lord Eldon says,

(a) 2 De G. & Sm. 722.

(b) In the case of *Edwards v. Pugh*, before the Vice-Chancellor Wood, on the 7th of June, 1853, the decree was as follows:—

"Decree, January 23, 1852, on further consideration:—

"June 7th, 1853, folio 107d.

"This Court doth declare, that, as between the specific devisees and the residuary devisees of Richard Smyth, the testator, so much of the unsecured debts, and funeral and testamentary expenses, and costs of this suit, including the claims of Rose and Chamberlain in the Master's report mentioned, and also the excess of the mortgage debt to Elizabeth Lewis over the value of

the lands charged therewith, as the testator's personal estate, including the surplus proceeds of the leasehold hereditaments in the Master's report mentioned, after satisfying the mortgage thereon, was insufficient to discharge, be apportioned and borne rateably by the hereditaments comprised in each devise, according to the respective values of the hereditaments comprised in each such devise, after deducting from such values the mortgages or apportioned share of mortgages affecting the same respectively, and the values of the annuities, if any, charged thereon, and in the Master's report mentioned," &c. &c.

(c) 8 Ves. 305.

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"Every devise of real estate, whether in general terms or not, is in the nature of a specific devise. It is different as to personal estate." A general gift of personal estate is not specific. The reason is, that land is so specific in its nature that it cannot exist in any other shape. You cannot generalise land. Personal estate fluctuates and varies, and may exist in various shapes; but land cannot. It is specific and invariable in its essence(a). Mr. Giffard, indeed, said very truly—"If that be so, every leasehold estate which passes by general residuary words is specific too." So it is; but it is personal estate, and there intervenes a rule of law, which has been established for the convenience of mankind, namely, that personal estate has no locality, and cannot be made specific without a particular provision by the testator. It is governed by the domicile of the owner, and therefore every man is supposed to have his personal estate about him and in his pocket when he dies. But land is essentially local.

The new Wills Act has provided that every will is to be read as if it were executed and published at the time of the testator's death. This would seem to be conclusive; for, if before the late Act every residuary devise of real estate was specific, and a residuary gift of personal estate, although it included leaseholds, was never held to be specific as to the leaseholds, the effect of the Act is to leave the law as to residuary devises of land being specific exactly as it was. Now, all this I am saying without the benefit of that full argument upon the question which I should desire, inasmuch as there is a great deal of authority against the view I have stated. If I could see that

(a) "Every devise of land is specific. Every legacy of personal estate is not, because personal estate fluctuates and varies; land does not, for no more passes by a will than the testator had at the time of making his will."—*Forrester v. Lord Leigh*, Amb 173.

the view taken by the Vice-Chancellor Kindersley and the Master of the Rolls was taken upon a full consideration of the principle, I should have implicitly followed their view. But I cannot think—until Vice-Chancellor Kindersley's views shall have appeared in an authorised report—and considering that the Master of the Rolls carefully abstained from stating any grounds for his opinion—that I am absolutely bound by the cases referred to. When the question again arises, the view I have endeavoured to state may be considered, and the law may be settled one way or the other.

Here I think that the gift over is as specific as any gift can be; and that the whole of the real estate is bound to contribute. All the property specifically bequeathed must bear the costs of the suit; the costs of all parties, as between solicitor and client, to be raised by sale or mortgage of the real estate.

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*Feb. 21st,
22d, 23d,
& 24th.*

PERRY v. HOLL.

Where a principal, resident abroad, gave a power of attorney to his solicitor in England, with ample powers, but not in terms authorising the agent to borrow money, and subsequently directed him as his agent to do so—*Held*, he could not repudiate a mortgage which the agent had effected in his name.

THIS bill was filed by William Perry, her Majesty's Consul at Panama, praying as follows:—

1. "That it may be declared that the plaintiff is not liable to the payment of the said sum of 500*l.*, or any interest in respect thereof, purported to be secured by the said agreement of the 6th day of June, 1851, and that the same agreement may be declared to be void against the plaintiff, and that the same may be cancelled, or ordered to be delivered up to the plaintiff.

2. "That it may be declared, that the execution of the said indenture of the 22d day of June, 1857, by or on behalf of the plaintiff, is no bar to the relief prayed by the plaintiff by this bill, and if necessary, the signature and seal of the plaintiff thereto may be cancelled or removed therefrom.

3. "That the said sum of 730*l.* 14*s.*, or the Bank Annuities in which the same has been invested, and other the Bank Annuities or cash standing to the credit of this cause, and representing the proceeds of the said policy, may be ordered to be paid to the plaintiff."

On the 12th of November, 1841, the plaintiff executed a power of attorney, reciting that the plaintiff, being about to leave the United Kingdom of Great Britain and Ireland, and reside at Panama, had requested John Parkinson of No. 9, Argyll Street, Regent Street, gentleman, to take upon himself the care of his estate and property, and to act for him in his affairs during his absence, which

Parkinson had consented to do. The power then proceeded (briefly) as follows:—

“ Now, know ye, that the said Perry hath appointed, and by these presents doth appoint John Parkinson his true and lawful attorney, to act in and conduct and manage all and every the affairs, matters and things of Perry, being within the United Kingdom, during his, Perry's absence, and for that purpose doth by these presents authorise and empower Parkinson, in the name and on the part and behalf of Perry, to ask, demand, sue for, recover, and receive, from all persons and bodies politic or corporate in the United Kingdom, all sums of money, debts, dues, goods, wares, merchandises, chattels, effects, and things of what nature or description whatsoever, which now or at any time during the subsistence of these presents may become due or owing to him, Perry. To settle any account or reckonings, and receive balances; to receive all sums of money now due, or which may become due on mortgage or other securities, and on receipt thereof to sign good discharges. To execute all sufficient reconveyances, releases, or other assurances of lands held in mortgage; to sign certificate of bankrupts, and release of insolvents, and to compound for debts, and to receive compositions or dividends, and to give discharges of such debts, or submit to arbitration all other claims, rights, matters and things concerning him, Perry, as he Parkinson should think fit for the benefit of Perry, and to enter into arbitration bonds. To appear for Perry in all courts, before all magistrates, or officers at law or in equity whatsoever, as Parkinson shall think fit. To sue, arrest, distrain upon, imprison, and out of prison liberate, release, and discharge all persons indebted or to become indebted to Perry. In the name of Perry to commence any action or suit, real as well as personal, in any court of law or equity, to recover any debt, sums of money,

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right, title, interest, property, matter, or thing whatsoever due to Perry, by any means, and to prosecute or discontinue, or become nonsuit therein, if Parkinson should see fit. And in any other lawful way to recover debts, to appoint any solicitor or attorney at law or in equity, to sign and give any warrant or warrants, and to prosecute and defend in the premises in Perry or Parkinson's name. To enter upon all farms, lands, hereditaments, and real estates of Perry, and to examine their condition and forthwith to give proper notices for repairing the same, and to oversee, and manage, and improve them to the best advantage; to pay or allow all taxes, rates, charges, deductions, expenses, and all other payments and outgoings due or to become due on account of such lands. And to contract with any person for leasing all or any of the said premises, to set fines for new leases, and to accept surrenders of leases; and for that purpose, in Perry's name, and as his act and deed, to make, seal, deliver, and execute any lease or leases, demises or grants, or other deeds necessary in that behalf; to receive and recover all rents and arrears of rents, services, issue, profits, emoluments, and sums of money now due or to become due; and to enter and distrain, and the distresses to retain and keep, or to sell and dispose of, according to law. And, for all or any of the purposes aforesaid, to enter into and sign, seal, and execute, and perfect, and as the act and deed or acts and deeds of the said Perry to deliver, any contract or contracts, deed or deeds, surrender, and assurances for conveying, either by way of absolute sale or in exchange, the said messuages, lands, tenements, or hereditaments, or any part or parts thereof, in and about the premises aforesaid, and by virtue thereof, and for the better doing, performing, and executing all or any of the matters and things aforesaid, he, the said William Perry, doth hereby further give and grant unto the said Parkinson full power and authority to substitute and appoint, and in his

place and stead put one or more attorney or attorneys for him, Perry, and as his attorney or attorneys, and any such appointment or attorney to revoke or displace, and any others appoint, as he should think fit.

(Signed, sealed, &c.) "WILLIAM PERRY."

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There was no clause expressly authorising Parkinson to borrow money.

The plaintiff was possessed of certain leasehold houses at Brixton, and, as he alleged, his object in giving the power of attorney to Parkinson was to enable him to receive the rent and his official salary; he had kept for some years a banking account with Messrs. Ransom & Co., of Pall Mall, on which Parkinson used to draw in such a manner that it became more his account than the plaintiff's. The plaintiff was also possessed of two policies of insurance, one of which was in the Law Life Assurance Company for 1800*l.*, and the other in the Hope, afterwards the Imperial Life Insurance Company, on the life of the Rev. John Daniel Haslewood for 619*l.* 10*s.*, with an annual premium of 31*l.* 18*s.*

In 1849, Parkinson, having received 500*l.* on behalf of the wife of the defendant Holl, proposed to Holl to lend it to a client of his, Parkinson's, and on Holl assenting, the policy for 1800*l.* was deposited as a security, but it was afterwards substituted for that in the Imperial Office. An agreement was drawn up, dated the 6th of June, 1851, by which the policy in the Imperial Office was agreed to be deposited with Holl and Jane Emma, his wife, as a security for the 500*l.*, with a proviso that Perry would, if required, execute a proper deed of assignment.

The instrument was signed "William Perry—his attorney, John Parkinson."

There was given in evidence by the defendants numerous letters between the plaintiff and Parkinson, for the purpose of showing that the plaintiff contemplated that

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Parkinson might have to borrow money on his, the plaintiff's, behalf.

" Panama, May 15th, 1850.

" My dear Parkinson.—I am under the necessity of taking some steps to relieve myself from a great imposition which has been lately put upon me.

" Some months back, I entered into a verbal agreement with my landlady, for the renewal of the lease of my house, at a considerably higher rate than I have been accustomed to pay. You may imagine my disgust at receiving notice to quit on the 22d of this month; unless I agree to pay 3000*f.* a year, or 600*l.* The woman repudiates her former agreement, and takes advantage of my situation, knowing well that there is no other house in the place suitable, and I am obliged to submit. Under these circumstances, I have decided upon building, and I have obtained a favourable site for a house. I beg of you, therefore, to raise 1000*l.* for me, either on Haslewood's policy, or on the houses at Kennington. I should think that, probably, the former would be the easiest method, but I leave it to you to do the best you can for me. I mentioned in a former letter, that if you could sell the houses at Kennington, at a fair price, I should be glad, but as I must set to work at once to build my house, I must depend on you to transact this business with as little delay as possible.

" I write by this packet to Mr. James Ridgway on the subject; and I tell him that you will probably consult with him on the subject.

" When you get the money, which I trust you will be able to do on the power of attorney you hold of mine, and, without loss of time, I would beg of you to pay it to my credit to Messrs. Mocatta and Goldsmid, who will send it out in francs; by which I gain considerably. The house will cost me about 2000*l.*; I will beg of you to pay

into Mocatta any balance you may have of mine, always retaining enough to meet the outstandings. Let me hear from you as soon as possible.

“ Believe me, yours very truly,

“ WILLIAM PERRY.

“ John Parkinson, Esq., &c., &c.

“ 9, Argyll Street, London.”

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On the 18th of September, 1850, he wrote thus:—

“ If you can send me 1500*l.*, or 2000*l.*, I shall be able to retire from this place two years hence, after selling the same house for 6000*l.* or 7000*l.* I hope you have been able to sell the houses in Kennington, and raise 1000*l.* on Haslewood's policy of insurance. Do not sell it, however; but you have power and authority to raise money.”

Parkinson having obtained back the policy for 1800*l.* from the defendant Holl, succeeded in borrowing on it the money required, which he transmitted to the plaintiff.

No notice was given to the offices.

By a deed, dated the 22d of June, 1857, Parkinson assigned all his property for the benefit of his creditors.

In September, 1857, Mr. Haslewood died, and the money was ultimately paid into court.

The bill charged that the plaintiff never authorised or knew the borrowing from Holl, and ought not to be charged with the loss.

Mr. Craig, and Mr. Schomberg.—It was admitted here there was no express power given to authorise Parkinson to borrow money, on behalf of the plaintiff. A power must be strictly construed, and “ the general words of a power are not to be construed at large, but simply as

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giving general power to carry into effect the special purposes for which they were given:" *Attwood v. Munnings* (a). Therefore, a power of attorney to receive salary, and to compound and discharge debts, and a power to transact all business, gives no power to negotiate or indorse bills: *Hogg v. Snaith* (b), *Hay v. Goldschmidt* (c). Here, the object of the power was, simply to allow the agent to receive the purchase-mones which it was supposed would become payable before the plaintiff's return. But, even if there were authority, there has been nothing which, in this Court, amounts to payment to the plaintiff. If the proceeds of the policy had been paid to the defendant, it would not be a valid payment. Where a purchaser paid to the vendor's agent part of the purchase-mones, retaining the amount of a debt due from the agent to him, and the vendor in ignorance executed the conveyance, it was held that the purchaser was not discharged: *Young v. White* (d).

In *Young v. Guy* (e), where a solicitor obtained from one client a bond to enable him to borrow money to pay off a mortgage of which the transfer was prepared, and the solicitor, having money of another client, gave him the bond and retained the money, but never paid off the mortgage, the Court ordered the bond to be returned to the mortgagor.

Here Parkinson acted as solicitor for both parties; and as the plaintiff never received the money retained by the solicitor, it was submitted that he could not be charged therewith.

[*Todd v. Reid* (f), *Vandeleur v. Blagrove* (g), *Bartlett v. Pentland* (h), *Russell v. Bangley* (i), *Barker v. Greenwood* (k), *Le Neve v. Le Neve* (l), *Burmester v. Morris* (m),

(a) 7 B. & C. 278.

(b) 1 Taunt. 347.

(c) Ibid. 349.

(d) 7 Beav. 506.

(e) 8 Beav. 147.

(f) 4 B. & Ald. 210.

(g) 6 Beav. 565.

(h) 10 B. & Cr. 780.

(i) 4 B. & Ald. 395.

(k) 2 Y. & Coll. Exch. 414.

(l) 3 Atk. 646.

(m) 6 Exch. 796.

Viney v. Chaplin (a), *Cockell v. Taylor* (b), *Griffin v. Clowes* (c), were also cited.]

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Mr. *Malins* and Mr. *Lewin*.—The plaintiffs admit the general agency, and admit that, under this very power, money was raised by *Parkinson* for the plaintiff and applied to his use. It was submitted, therefore, that it was not competent now for the plaintiff to deny *Parkinson*'s power to raise money on his behalf.

In the case of *Hogg v. Snaith*, on which the plaintiff relied, the decision merely was, that the words "transact all business" did not authorise matters which were not part of the subject matter.

In *Attwood v. Munnings*, a power of attorney, given to manage private affairs, did not extend to partnership business.

Here, the plaintiff himself referred to the raising money as within the power of attorney: *Withington v. Herring* (d), *Bank of Australia v. Breillat* (e), *Smith v. Maguire* (f), *Athenæum Assurance Society v. Pooley* (g), *Sainsbury v. Jones* (h).

Mr. *Hetherington* appeared for the defendant *Parkinson*.

The VICE-CHANCELLOR :—

There are two questions in this case: first, whether, on the true construction of the power of attorney itself, there was sufficient authority given by the plaintiff to *Parkinson* to borrow money on the security of the policy of assurance; secondly, whether any deficiency in the authority given by the power of attorney has been supplied by the plaintiff's correspondence and conduct.

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(a) 2 De G. & J. 468.

(f) 27 L. J. 465.

(b) 15 Beav. 103.

(g) *Ante*, Vol. i. 102.

(c) 20 Beav. 61.

(h) 2 Beav. 462; s. c. 5 M.

(d) 5 Bing. 442.

& C. 1.

(e) 6 Moore, P. C. 152.

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The power of attorney is in unusually large terms, and for unusually large purposes. It recites that the subject matter of the power is to enable Parkinson to take upon himself the care of the estate and property of the plaintiff, and to act for him in his affairs during his absence; and then, in the witnessing part, it is a power to Parkinson to act in, and conduct, and manage all and every the affairs, matters and things of him, the plaintiff, being or happening within the United Kingdom of Great Britain and Ireland, during the absence of him, the said plaintiff; and for that purpose there are inserted a number of special powers. One of these special powers is so large as to authorise, for the purposes aforesaid, Parkinson to sell or exchange the real estate of the plaintiff.

This is an extraordinary power, and the general words at the end of the power are, "for all or any of the purposes aforesaid, generally, to do all and every or any acts, deeds, matters or things whatsoever, in or about the estates, property, and affairs of him, the said William Perry, as amply and effectually to all intents and purposes as Perry, the plaintiff, could do or have done in his proper person, if these presents had not been made; he, the plaintiff Perry, hereby ratifying and confirming, and promising and agreeing at all or any times or time, to allow, ratify, and confirm, all and whatsoever the said John Parkinson shall lawfully do or cause to be done."

That is a power of extraordinary amplitude; but, certainly, it does not, in express terms, include a power to borrow money upon any security, unless by implication.

Among other powers, there is a power to repair the property, and to manage the real estate. There is no power to borrow money unless by implication, and that would be only for repairs; therefore, upon the construction of the power, there does not seem quite enough to justify the power of borrowing upon the security of the policy of assurance.

But what is not expressed in the power itself, seems to me, beyond all doubt, expressed and comprehended in the letters under the hand of the plaintiff himself, which it is impossible for him to gainsay. The letter of the plaintiff of the 15th of May, 1850, really contemplates, and even directs, money to be raised upon the security of one of the policies in question, and says that the power of attorney is sufficient authority for the purpose. It is very true that that letter was written after the transaction in question; but it is also true that it was written to Parkinson, and is part of the correspondence between the plaintiff and Parkinson, during which correspondence, and in a letter of Parkinson's written before the transaction in question, borrowing money upon the security of policies of assurance is clearly contemplated. Therefore, upon the construction of the acts of the parties, coupled with the language of the power, it seems to me impossible for the plaintiff now to say that Parkinson—acting as his attorney, having the custody of these policies of assurance, and the entire management of his estate and affairs, and being in the course of the correspondence told to borrow money upon one of these policies of assurance—was not authorised to borrow money upon the security of the policy in question.

In the letter of the 15th of May, 1850, the policy of assurance spoken of is that very policy which, in the year 1849, was the first policy deposited with the defendants Holl to secure the money which the defendants Holl are proved to have advanced. There are various other letters in which the plaintiff urged Parkinson to borrow money upon the security of the policy of assurance. Upon that part of the case, therefore, the plaintiff has failed.

But the plaintiff also insists that there was no such advance of money by the defendant Holl as can be considered by this Court a sufficient payment by him to the plaintiff Perry.

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Upon this part of the case, reference has been made to several authorities, the strongest of which is a case of *Griffin v. Clowes*. In that case, upon the transfer of a mortgage, the money which was to be the price of the transfer was to be paid to three trustees. Instead of its being paid to the three trustees, an arrangement was made by one trustee only, without the privity of the others, to dispense with payment altogether, and to treat by way of set-off a debt due by one of the trustees to the transferor, and so to work out the payment.

It is quite clear that in a case where the payment was to be made to the three trustees, the Master of the Rolls was bound to hold that payment to one only would not do. That case is entirely different from the present; because, if Parkinson had power to borrow money, the money to be borrowed upon the security of the policy pledged by him would be payable to Parkinson; and the payment here was effected in this way—not that there was any pre-existing debt from Parkinson to Holl, who claims to have advanced the money; but that Parkinson had in his hands a sum of money belonging to Holl which, at the time of the transaction as to the loan, Parkinson was bound to pay over to Holl. Parkinson says, “My client, Mr. Perry, wants to borrow some money, and if you lend this 500*l.* to him, you shall have this security of the policy of assurance.” That is agreed to by Holl, and therefore the money of Holl which was in the hands of Parkinson as money payable to Holl, is as completely paid to Parkinson, as agent of Perry, as if it had first been put into the hands of Holl, and by Holl repaid to Perry.

Therefore upon both points—both upon the authority given by the plaintiff to Parkinson, and upon the mode of payment, the plaintiff's case entirely fails.

There is another circumstance in the case. The policy, first deposited in the year 1849, to secure the 500*l.*

advanced by Holl, was a policy for a large sum. It was that very policy which is spoken of in the plaintiff's letter to Parkinson in May, 1850, for the purpose of Parkinson raising money upon it. If Parkinson had obeyed the instructions of the plaintiff, conveyed in his letter of the 15th of May, 1850, and repeated in subsequent letters, he could not have obeyed those instructions without regaining possession of the policy. He had parted with the policy to Holl for a valuable consideration; and in order to obey the instructions of the plaintiff, who wished to have a larger sum than 500*l.* raised, Parkinson was obliged to redeem the policy from Holl; and he did redeem it by substituting another policy upon that occasion. A regular instrument and memorandum of deposit of the other policy, in lieu of that which was first deposited, was executed between the parties, and the result was this, that by means of this transaction, when Holl parted with this policy in exchange for another, the plaintiff had from Parkinson an advance of 1500*l.* for the purposes for which he required the money; and for that 1500*l.* so advanced by Parkinson, Parkinson had a clear lien on the policy, and the existence of that lien upon the policy shows that a benefit accrued to the plaintiff in the way that he contemplated, of an advance of money upon that very policy which was redeemed from Holl.

Therefore, upon every view of this case, which is a hard one upon both parties, the loss which must be sustained by one party or the other, from the scandalous fraud of Parkinson, must be borne by the plaintiff. The case is one of hardship; but the plaintiff has come into court to establish his title, and has failed as against the defendants Holl; and therefore there must be a declaration that the defendants Holl are entitled to the payment of their 500*l.* with interest, so far as it remains due—the amount to be verified by affidavit—out of the proceeds of

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the policies, and to the costs of the suit against Perry. But the costs so paid by Perry to Holl, together with Perry's own costs of the whole of this litigation, must be recovered over by Perry against Parkinson. This part of the order may not be of much avail; but the plaintiff has a clear right to recover his costs against Parkinson. The counsel for Mr. Parkinson insisted on his right to costs, and insisted also that he was improperly a defendant in this suit. I think that Parkinson was properly a defendant in this suit; and that the plaintiff, Mr. Perry, must recover his own costs and the costs paid to Holl, the defendant, from Mr. Parkinson.

It was ultimately arranged that the 500*l.* and costs of the suit should be taken out of a sum of 730*l.* in court, *pro tanto*.

JOHNSON v. SMART.

1860.

April 17th.

THIS bill was filed for specific performance of an agreement to purchase Lots 2, 3, and 4—a freehold messuage and two plots of ground in Belle Vue Road, Handsworth, Staffordshire. The property was offered for sale by public auction on the 10th of August, 1859. The particulars of sale were as follows:—

“Lot 2. All that substantial and convenient freehold dwelling-house, with the coach-house, stable, and other outbuildings thereto belonging, occupying 225 yards of land, or thereabouts, situated in the Belle Vue Road, Handsworth, and recently in the occupation of the late Mr. Fallows Heath. The dwelling-house contains two sitting-rooms, kitchen, brewhouse, and five bed-rooms.

“For the keys to view the house, apply to Mr. Gordon, butcher, Booth Street, Handsworth.

“Lot 3. All that eligible piece of building-land adjoining the last lot, having a frontage of six yards to Belle Vue Road, and containing in the whole 130 square yards of land or thereabouts.

“Lot 4. A piece of eligible building-land adjoining the last lot, and also having a frontage of six yards to Belle Vue Road, and containing in the whole 155 square yards of land, or thereabouts.”

The conditions were nearly in the usual form; the 8th required all objections as to title to be delivered within fourteen days. The 11th was as follows:—

“That if through any mistake the description of the premises, the rents, tenures, or outgoings, are misstated or omitted in the annexed particulars, or any other error shall appear therein, such mistake or error shall not vitiate

Where a house was described as substantial and convenient, and having five bed-rooms. On a bill for specific performance —*Held*, that this was no misdescription, although the house was out of repair, and the walls in some places were only half-brick thick, and some of the bed-rooms extremely small inner rooms, and without fire-place.

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or annul the sale, but a compensation, or equivalent, shall be given or taken as the case may require."

The defendant attended the auction, and Lots 2, 3, and 4, having been put up in one lot, at 250*l.*, he at once bid 400*l.*, and was declared the purchaser; and his solicitor, Mr. Gill, of Birmingham, who was there present, paid Mr. Rowley, the plaintiff's solicitor, a deposit amounting to 40*l.*, and signed the contract. On the 12th of August, defendant, with his solicitor, called on the auctioneers, and complained of the misdescription, when they were told that neither of the parties had inspected the property; upon which the defendant's solicitor inquired who prepared the description, when he was told it was the plaintiff himself. The defendant and his solicitor then proceeded to the plaintiff's solicitor, who stated the same fact. On the 29th of August the abstract of title was delivered, upon which the defendant's solicitor sent the following reply:—

"Smart and Johnson.

"As intimated to you by me on the 12th ult., Mr. Smart will insist on rescinding the contract, on the ground of the false description of the property. I therefore return the abstract which you delivered to him.

"Yours truly,

"RICHARD GILL."

Some further correspondence took place, and ultimately, on the 30th of November, 1859, the defendant commenced an action in the Court of Queen's Bench to recover the deposit (40*l.*) This bill was then filed for specific performance of the contract and for an injunction, alleging there was no misdescription, or, at all events, only such as was the subject of compensation.

There was conflicting evidence as to the character and condition of the property.

The defendant deposed that he had no knowledge of the property, and relied on the description contained in the advertisement and in the particulars of sale, and attended the sale in order to purchase a residence. That he knew the property described as Lot 1 (which belonged to a different proprietor), and, knowing the description to be accurate, supposed the rest to be equally so. That after the sale he proceeded to inspect the property, and had great difficulty in finding the road described as Belle Vue Road, which was unfenced, and formed by cottages chiefly occupied by labourers, and that when he discovered it, he could not believe it was the right place.

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The 16th paragraph of his affidavit is as follows:—

“The said house consists of the ground floor, and one floor over. Every pane of glass in the front windows of the ground floor of the said house was broken, and many of the panes in the front windows of the said house over were broken. The external appearance of the said house at once convinced me that the description thereof in the said Lot 2 in the said second advertisement was false, and that it was not a substantial house. Upon going through the said house, I found that one of the rooms, called a sitting-room, was totally unfit and useless for the purpose of a sitting-room.

“I also found that two of the rooms, called bed-rooms, were altogether unfit and useless for the purpose of bed-rooms. They are, in fact, nothing but closets, or small store-rooms, and fit only for such, there being no fire-place in one of them, and no separate entrances; but in order to get to the one, it is necessary to go through the others. I also found that the whole of the said rooms in the said advertisement described as bed-rooms, were even at that period of the year, in the month of August, damp; and that in three rooms, which alone, out of the five, were papered, the paper was actually hanging loose

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from the walls, having been detached therefrom by reason of the damp.

“The stair-case, leading to the said rooms called bed-rooms, is so steep, narrow, and dark, that it is not only inconvenient, but dangerous.

“The so-called brewhouse is quite unfit and useless for brewing purposes.

“There is a small iron pump, but no water, nor is there any sewerage upon or about the premises.

“The coach-house is so small as to be unable to hold a gig of the ordinary dimensions, and the approach thereto is so narrow, that a gig of the ordinary width could not pass.

“The premises altogether were in a deplorable state, and I say that the said house is neither suitable nor convenient.”

There was adduced, on the part of the plaintiff, the widow of a former occupant of the house, who deposed that during her husband's occupancy, four of the chambers were used as bed-rooms. Mr. Gibson, the auctioneer, also deposed, that he had examined the chambers, and that they were proper and suitable for bed-rooms.

It was not denied that one of the external walls of the house was only half a brick thick, and that two of the bed-rooms were respectively 9 feet by 8 feet 8 inches, and 11 feet 10 inches by 7 feet 9 inches.

There was a complete conflict in the evidence as to the quality and condition of the house.

Argument.
—

Mr. *Malins* and Mr. *Bird*, for the plaintiff, contended that there was no misdescription in fact, but even if there were, it was clearly of such a kind as to be the subject of compensation. The defendant was himself well acquainted with the value of house property; he lived within a few miles of the property, and ought to have satisfied himself that it was what he wanted before he

prevented other persons from purchasing, and then sought to throw up the bargain.

Mr. *Bacon* and Mr. *Smale*, for the defendant.

The house is described as a substantial dwelling-house; but it appears from the evidence that one outer wall was only half a brick thick; the particulars, therefore, were clearly inaccurate. Again, two rooms, described as bed-rooms, were only 9 feet by 8 feet 8 inches, and 11 feet 10 inches by 7 feet 9 inches, and could not be correctly described as bed-rooms.

This was not a bill to rescind the contract, but a bill for specific performance, and therefore misdescription, though in a slight degree, is a fatal objection: *Cadman v. Horner* (a). "A party contending for specific performance must show that his conduct is fair. If he has made material misrepresentation to the defendant, it is no answer to say that the defendant might have found out that they were such. Specific performance is not of course because there was a contract, but an indulgence peculiar to the jurisdiction of equity:" *Cox v. Middleton* (b).

Here the misdescription is so gross, that it amounts to bad faith on the part of the vendor, in which case the Court could discharge the purchaser: *Lachlan v. Reynolds* (c). If the mistake were intentional, the purchaser's right was not to compensation, but to be discharged from the contract: *Stewart v. Alliston* (d); and whereas here compensation was impossible, the purchaser was entitled to be discharged, whether the misrepresentation was intended or not: *Pulsford v. Richards* (e); *Sugd. V. & P.* (f); *Wood v. Scarth* (g); *Stanton v. Tattersall* (h); *Edwards v. M^cLeay* (i).

(a) 18 Ves. 10.

(b) 2 Drew, 209.

(c) Kay, 52.

(d) 1 Mer. 26.

(e) 17 Beav. 87.

(f) 13th ed. 23.

(g) 2 K. & J. 33.

(h) 1 Sm. & G. 529.

(i) 2 Swanst. 287.

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THE VICE-CHANCELLOR:—

The description is of a “substantial and convenient dwelling-house”—a description so relative in its terms, as to afford abundant opportunity for a conflict of evidence as to matters which are rather matters of opinion than of fact.

The first part, however, of the alleged misrepresentation refers to a matter of fact. It is said that though the house is described as containing five bed-rooms, two of the rooms are so small and inconvenient as to be unfit for bed-rooms, and therefore not falling within the description. But the smaller of the two rooms is at least eight feet in width and nine in length, and though of small dimensions, might unquestionably be used as a bed-room. Then it is said it has no fire-place, and no external door into the hall or lobby. But as these wants do not unfit the apartment for use as a bed-room, and the language used cannot therefore be said to amount to a misdescription, considering that they were applied not to a first-class house, therefore, this part of the defence fails.

But the defendant also alleges that the house is not substantially built, and relies on the evidence of several surveyors to show that the walls are of insufficient thickness, that there were cracks in them, and a defect in one of the gables. As to this part of the case, there is a complete conflict in the evidence, though, on the whole, the weight of evidence is in favour of the plaintiffs. There is the united testimony of three surveyors, who enter into the consideration of these defects, and who have satisfied me that the house is not improperly or untruly described as a substantial and convenient dwelling-house. These witnesses describe the size of all the rooms; they state that the cracks are trivial, and hardly

discernible; that the roof is good and substantial; they examined the floors, and describe them as good and strong; they examined the house, and depose that it is well and substantially built, and that the materials employed are of the usual average quality. The defendant, by his evidence, has failed to prove any material misdescription, and there must, therefore, be a decree for the specific performance of the agreement, with costs up to and including the hearing and the action at law. Continue the injunction, and direct the usual inquiry as to title.

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LONGMATE v. LEDGER.

April 18th &
19th.

THIS bill was filed by the heiress-at-law of one John Mitchell, for the purpose of having set aside a sale of certain freehold cottages and land, which had been made by the vendor to Solomon Ledger, in 1857. The grounds on which the plaintiff's case rested were, that the vendor, at the date of the sale, was suffering from mental incapacity, and also that the price given was wholly inadequate.

John Mitchell had been a farm labourer, but in the year 1856, he acquired, as next of kin of James Mitchell, his brother, the sum of 900*l.*, which, by the advice of a Mr. Butler, he invested in the purchase of three freehold

Where a vendor of feeble intellect sold his property to a creditor for an inadequate price, the Court—on a bill filed by his heir, impeaching the transaction—set aside the sale, but directed the deed to stand as a security for monies actually due, on the footing of a mortgage.

Mere inadequacy of price is insufficient of itself to vitiate a sale; but where there is weakness in the mental capacity of the vendor, the sale cannot be sustained in this Court, unless the vendor has been adequately protected in the transaction.

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cottages and eight acres of land at Willingham-by-Stow, and which were conveyed to him absolutely, with uses to bar dower.

In July, 1857, he agreed with his daughter and her husband (the plaintiffs) to sell them the property in question in consideration of an annuity of 10*s.* a week to be paid to himself, and after his decease to his widow, with a stipulation that he was to live in one of the cottages rent-free. Shortly after this arrangement, the plaintiff, Robert Longmate, contracted with the defendant, who was a builder at Gainsborough, to build a house on the land for 150*l.* In August, 1857, a quarrel took place between John Mitchell and the plaintiffs, which resulted in the termination of the agreement of July, 1857. The plaintiff, Robert Longmate, therefore requested the defendant to substitute John Mitchell for him, which the defendant agreed to do, and John Mitchell accordingly signed the substituted contract.

In September, 1857, John Mitchell, being then seventy-two years of age, agreed to sell his property to the defendant for an annuity of 1*l.* a week, to be secured on the property, on condition that he should be allowed to live in one of the cottages rent-free, and be released from the debt of 150*l.* On the 6th of October, 1857, a deed was executed by John Mitchell carrying the above agreement into effect. One solicitor acted for both parties.

On the 9th of June, 1859, John Mitchell died intestate, having occupied one of the cottages rent-free up to his death, and having received the annuity.

The plaintiffs subsequently filed this bill, impeaching the transaction, alleging that the defendant had availed himself of the ignorance and mental weakness of the vendor to acquire the property for a grossly inadequate consideration. The bill alleged that the annual rental of the cottages and land at the death of the vendor was 42*l.*, and the value about 800*l.* The bill further alleged that the cottage occupied by John Mitchell was

worth 4*l.* a year, which with the annuity made a total of 56*l.* a year, which, at the vendor's age, might have been purchased for about 350*l.*

The defendant admitted the value of the property was about 750*l.*

The bill prayed that the sale might be set aside, but that the deed of the 6th of October, 1857, might stand as a security only for what the defendant had expended in buildings on the land in the lifetime of John Mitchell, and for all payments made to John Mitchell on account of the annuity, which exceeded the amount of the rents received, together with such interest as the Court might award. The bill also prayed for an account and a re-conveyance.

The evidence as to the state of the vendor's capacity was very voluminous.

Mr. Newton, who had acted as his solicitor on the occasion of James Mitchell's intestacy, deposed as follows:—
 “The said John Mitchell was a farm labourer, and appeared to me to be ignorant, eccentric, and weak-minded, and altogether unacquainted with the management of property; and having become aware, from information derived from a nephew of the said John Mitchell, that the said John Mitchell had promised his said nephew to give him one-half of the property to which the said John Mitchell was entitled as one of the next of kin of his brother the said James Mitchell, on the ground that the said nephew had been instrumental in obtaining for the said John Mitchell such property, and had been the first to inform him that he was entitled thereto, I advised the said John Mitchell to make the settlement and will mentioned in the exhibit D; and the said John Mitchell at first consented to make such settlement and will, and instructed me to prepare the same accordingly; but he afterwards refused to execute them.”

Mr. Butler, by whose advice John Mitchell invested his money in land, said that “John Mitchell saw a man

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running in the highway, and asked him what he would buy his property for; and he offered to sell his property upon any terms."

The clergyman of the parish deposed: "John Mitchell was a very ignorant and uneducated man; he always appeared to me to be of an unsound mind, and was not in my opinion competent to transact business of the slightest importance, or to have the management of property." On cross-examination, he said, "If, in 1857, I had been asked to attest his will, I might, under the circumstances, have not refused to do so. It is very difficult to refuse on the ground that a person is not competent. I should have attested it, I think; but I should have had great doubt if I ought to have done so."

William Ellis, another witness, deposed as follows: "One morning in the month of August, 1857, about half-past five o'clock, before I had arisen, I was called up by the said John Mitchell, who said he wanted to see me. I dressed and went down and let him into the house. He had with him a butter-basket, out of which he produced the deeds relating to his property at Willingham, and said that he wanted to borrow 20*l.*, and had brought me his writings for security. I thought it strange that he should come to borrow the money of me in that way, and refused to let him have it before the following Tuesday. He then asked me if I would buy his life out, and said that if I would give him 1*l.* a week during his life I should have the property. I told him that he was a very simple man to talk in that kind of way, and that I would have nothing to do with it. I put the deeds into the basket, and told him to take them away and to take better care of them. He then started to go away, but when he got to the kitchen door he turned back and said, 'Will you say that I shall have the money on Tuesday? I want to make you a good bargain, and I will leave them.' He then took the

deeds out of the basket, threw them upon the kitchen table, and left them. I locked the deeds up, and then went over to the above-named plaintiffs, his son-in-law and daughter, and told them about it. On the following Monday, about seven o'clock in the morning, the said John Mitchell came to my house again. He said that he was come either for his deeds or for the 20*l.*, or, if I liked, he would still sell his life for 1*l.* a week; and that if I would not buy or lend the money, he would take the deeds to Gainsborough and borrow the money. I was well acquainted with the property, and knowing it to be worth a great deal more than the said John Mitchell was asking for it, and knowing him to be an ignorant and simple man, I refused to have anything to do with it; and, after advising him not upon any account to sell his property, I gave him the deeds, and he took them away."

It appeared from other evidence, after the purchase of the property, he built on a field a mud hut, consisting of pieces of wood driven into the ground and covered with mud, the inside being plastered with cow-dung, and the roof formed of pieces of wood, laid flat across from one wall to the other. The only window was a hole cut in the wall, with a wooden shutter; there was no flooring whatever, other than the bare ground, on which grass was growing. John Mitchell and his wife lived four months in this hut.

Matthew Pearson, blacksmith, deposed: "That John Mitchell was called 'Jack the Giant Killer;' he named himself when he lived a little way out of the town. He used to work with me when I was an apprentice; he used to live in a hut where they kept the tools. Some people called him 'Old Breeches.' The boys used to run after him when he was in the streets, and mimic and play with him."

There was a good deal of conflict in the evidence as to the mental capacity of the vendor.

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Mr. *Bacon* and Mr. *Schomberg*, for the plaintiffs.

The evidence showed that the vendor was not competent to enter into a contract, at least without proper assistance, and that his imbecility was a matter of public notoriety.

Mere inadequacy of price (short of what amounts to fraud), *Davies v. Cooper* (a), was not alone sufficient to invalidate a sale; but very slight grounds, where the price was, as here, clearly inadequate, would suffice. Where the vendor was of intemperate habits, the Court set aside the sale, mainly on the ground that the consideration was inadequate (b).

But, though the Court will decree specific performance of an agreement to sell in consideration of an annuity, where the transaction is a fair one, "it will inquire with some jealousy as to the fairness of the transaction, as was done in *Mortimer v. Capper* (c); and the decision in *Pope v. Roots* (d), shows that the Court requires a clear case for specific performance under such circumstances;" *Davies v. Cooper* (e).

Mr. *Malins* and Mr. *Fischer*, for the defendant.

There is nothing in the evidence to show imbecility or incapacity of mind in the vendor. That he was eccentric in his habits is not denied, but that was not enough to impeach the sale. The main ground on which the bill was rested, was that, in the event that happened, the consideration was inadequate; but it was well settled that mere inadequacy was not enough. "Mere inadequacy of price is not a sufficient ground for a Court of equity to refuse its assistance to a purchaser:" Sugd. V. & P. (f).

In this case there was no fiduciary relation between

(a) 5 M. & C. 277.

(b) Ibid. 276.

(c) 1 Bro. C. C. 156.

(d) 1 Bro. P. C. 370.

(e) 5 M. & C. 277.

(f) Page 231, sec. 5, *et seq.*

the vendor and purchaser, and therefore it was the duty of the plaintiffs to prove the unfairness on which they relied: *Harrison v. Guest* (a). In that case, the vendor was an old bed-ridden man of seventy-one years, who had acted without professional advice, and he had conveyed away the property, worth 400*l.*, in consideration of board and lodging for life, which lasted six weeks only after the conveyance; but the Court refused, in the absence of any fraud, to set aside the transaction on the ground of inadequacy of consideration.

If the purchaser used fair endeavours to ascertain the value, the sale would not be set aside because the parties might value the property at a higher rate: *Edward v. Burt* (b).

THE VICE-CHANCELLOR:—

By the settled doctrine of this Court, in order to have a valid contract or conveyance of property, there must be a reasonable degree of equality between the contracting parties.

In this case, it is established by the evidence, that the property was sold for a price greatly below the value. This circumstance, of itself, might not be sufficient to invalidate the transaction. But when there is the additional fact, that the vendor was a man advanced in years and known to be of a weak and eccentric disposition, and at the time of the sale was without the assistance of a disinterested legal adviser, there exists on the whole case such an inequality between the contracting parties, that it is to my mind impossible for the Court to recognise the claim of the defendant to hold this property under the contract, except as a security for the payment of the monies which have been actually advanced.

(a) 6 De G. M. & G. 424.

(b) 2 De G. M. & G. 55.

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Several authorities have been cited in the argument, but none of them have a strict analogy to the present case. Questions of a similar kind have been raised on bills for specific performance, but one of the difficulties of the present case is, that the contract has been performed, the consideration paid, and the property is now vested in the purchaser. In order, therefore, successfully to impeach the sale, the plaintiffs are bound to show, by clear evidence, not only inadequacy of price, but also such a want of capacity in the vendor as to vitiate the conveyance. And this is really the great difficulty in the case. It is always a difficult thing to define the exact degree of mental weakness that disqualifies a vendor from dealing with his property as he pleases. In this case that difficulty exists in a high degree. But although there is a conflict in the evidence, there is enough to show that the vendor, from various causes, was not competent to exercise a prudent care for his own interests, and did not in fact exercise such care. He was an old man, who, after he was seventy years of age, from being a common labourer, became possessed of a sum of 900*l.*; and it appears that Mr. Newton, the solicitor by whose aid he was put in possession of this money, advised him to make a settlement by will. The defendant contends that this circumstance proves Mr. Newton's opinion of his mental capacity; but it is quite plain from Mr. Newton's evidence, that he entertained a very decided opinion that this poor man was little able to take care of his property, or to manage his affairs in a prudent way.

It is proved by the united testimony of several witnesses, that this strange and eccentric creature, though not absolutely incompetent or incapable, was in such need of protection, that whoever entered into any contract with him would be bound to show, that no unfair advantage was taken of his weakness, and that a fair price was given to him. The case, therefore, resolves itself to this,

that a poor, weak, aged man, on the occasion of a quarrel with his daughter and her husband, went about, under the influence of this quarrel, endeavouring to sell his property, and in this state offered it to the defendant.

It must be observed, for the credit of the defendant, that he does not appear to have used any arts to induce the vendor to enter into this contract. He was a large creditor of the vendor, and had built a cottage on the land, which was the subject of the purchase, in respect of which there was 100*l.* due to him from the vendor. The amount of this debt seems to have made a deep impression on the mind of this poor man, and was probably the main reason that induced him to escape the ruin which he fancied was coming upon him by getting the defendant to grant him the annuity of 1*l.* a week, and to take the land in satisfaction of the debt. But the price was wholly inadequate, and the case is one in which the Court is bound to set aside the contract on the ground of inequality between the contracting parties.

The conveyance of the 6th of October must be set aside as an absolute conveyance, and must stand as a security for what has been actually advanced. It appears that the defendant has laid out money on the property, and he must therefore be dealt with as a mortgagee in possession, and an account taken on that footing.

The defendant must have the ordinary costs of a mortgage, but no costs of so much of the suit as relates to the question of the capacity of the vendor.

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1880.

*April 21st,
23rd, 24th.*

ORMES v. BEADEL.

Where a contractor, under pressure occasioned by the refusal of the architect to pay what was justly due under the contract, was induced by the architect to enter into a disadvantageous agreement, the Court set it aside, though by the terms of the original contract the decision of the architect was made final.

Where by contract the award of the architect is final, and is fairly and impartially made, this Court will not relieve against it, however severe it may be in its effects; but where the arbitrator is found guilty of unfairness or partiality, this Court will relieve against his award.

THIS bill was filed by the plaintiff, J. E. Ormes, a builder, against Messrs. Beadel, Son, & Chancellor, architects, &c., carrying on business at Chelmsford, and also against Alfred Copland, in order to have set aside an agreement, embodied in a letter dated the 11th of December, 1858, as being made under pressure.

Prior to August, 1858, Messrs. Beadel & Chancellor, on behalf of Copland, advertised for the erection of a dwelling-house at Chelmsford. The plaintiff sent in a tender for the work, at the sum of 1420*l*. The defendants accepted this tender, and, on the 13th of August the plaintiff signed the contract and specification, by which he agreed to do the works according to the specification, and to construct the building in carcass within three months, and to completely finish them by the 1st of February, 1859, in the best and most workmanlike manner; the conditions providing that, for every day after that date the works should be unfinished, the contractor should forfeit 5*l*. The conditions also provided that the contractor should keep the works in proper repair for six months from the date of the architect's certificate of completion, and that such an amount as the architect should deem sufficient for carrying into effect the conditions should be retained, and that the remainder should be paid during the progress of the work; and on its completion according to the architect's certificate. It was also provided, that the decision of the architect on all questions was to be final.

The fifth condition referred to in his Honour's judgment was as follows:—

“ That if the works do not proceed with such progress

as the architect may consider necessary, they shall be at liberty to purchase such materials and employ such workmanship as they may consider necessary, and deduct the costs of the same from any money due to the contractor on account of these works."

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The works were commenced a few days after the contract was signed, and in September and October the architects gave the plaintiff certificates upon which he received 225*l*. On the 20th and 27th of November, Chancellor refused to give a further certificate. The plaintiff at this time became much embarrassed for want of sufficient funds, as he alleged, in consequence of being disappointed in receiving a sum of 600*l*., on which he had relied. On Saturday, the 4th of December, the plaintiff was unable to pay the workmen's wages, and on the following Monday he wrote to both Copland and Chancellor, but received no reply. On the 7th, he called on both the said defendants to request an advance, but Copland was absent from home, and Chancellor refused to certify for any further payment. He then discharged several of the workmen. On the 11th of December, Chapman, the foreman, came to Braintree, where the plaintiff was, and informed him that if the plaintiff would sign the following paper, Chancellor would pay the workmen.

"Saturday, Dec. 11th, 1858.

"I ———, builder, of Bocking, Essex, do hereby consent, that upon Mr. Chancellor, of Chelmsford, architect, paying all wages due to men employed by me at the house building for Alfred Copland, Esq., New London Road, Chelmsford, the men will be discharged from my employment, and I give my consent to the above wages being paid."

The foreman told him the "men had seen" the magistrates, and that if he went to Chelmsford, he would be

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arrested. The plaintiff, however, went by railway to Chelmsford, where he found his men at the station, who followed him about the town, demanding their money, and refusing to go unless they were paid. He went to Chancellor's in the evening, followed by the men. After he had seen Chancellor, he was desirous of leaving the room, in order to obtain some refreshment, but the men refused to let him go, and a man, named Bowman, put out his arm, and prevented him from leaving. The plaintiff consequently returned to Chancellor's room, and Chancellor then asked him to sign the letter, which the plaintiff at first refused to do, alleging it was not a fair paper, but ultimately, on Chancellor's saying that unless he did he would give him no money, he assented. The plaintiff then objected to Gardner as valuer, and named several others, but Chancellor objecting to them, the plaintiff acquiesced, saying, "As I am obliged to sign it to get the money, I must;" and he accordingly signed the letter, which was in the following terms:—

" Chelmsford, Dec. 11th, 1858.

" Sir,—In consideration of your having paid over to me the sum of 50*l.* this day, I hereby give up the contract for building the new house in the New London Road, for Mr. Alfred Copland, from this date; and with reference to the work already completed, I agree that the value of such work as is approved by you shall be settled by Mr. Matthias Gardner, builder, of Coggeshall; he taking into consideration the contract for the whole of the house, and the terms upon which the same was to be erected; and provided the said Mr. Gardner is unable or unwilling to make such valuation, then I will leave it to Mr. D. C. Nicholl, surveyor, of Mecklenburgh Square, London, or Mr. H. H. Hayward, builder, of Colchester, or Mr. C. F. Hayward, architect.

"And I further empower you to deduct from the sum awarded to me as the value of the foregoing work, any and all monies you have paid to me, and may have to pay to others, on account of such building.

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"I am, gentlemen,

"Yours obediently,

(Signed)

"J. E. ORMES.

"To Messrs. Beadel, Son, &

"Chancellor, architects to

"Mr. A. Copland.

"P.S. I further agree not to interfere with the works or men engaged thereon, or to remove anything from the works, until after Mr. Gardner has given his decision.

(Signed)

"J. E. ORMES.

"Witness, CHARLES TAYLOR."

On the 17th of December the works were valued by Gardner as follows:—437*l.* 3*s.* 8*d.*; 57*l.* 10*s.* 4*d.* for materials.

The bill alleged that the contract was beneficial, and, in addition to being relieved against the document of the 11th of December, asked that the defendants might be decreed to pay to the plaintiff the amount of profits of which he had been deprived.

Chancellor, in his answer (paragraph 24), alleged, that on going from his house to his office, at six o'clock, he found the plaintiff and his workmen waiting to see him; that he, the plaintiff, went up-stairs to his private room, where the plaintiff began to lament his want of money, and asked the defendant to give him some. That the defendant said, "No such thing;" but added, that as the plaintiff was evidently unable to perform his contract,

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if he would give it up, the defendant would furnish him with money to pay his men. That the plaintiff appeared to think that the defendant wished him to forfeit his contract, and lose any balance which might be due to him, but on being told that the defendant was quite willing he should be paid for what he had done, the plaintiff appeared to be much relieved, and readily assented to the proposition; whereupon, after some discussion, the paper was signed. That the plaintiff proposed, and the defendant assented, to the name of Mr. Gardner, as valuer. That afterwards, in the lower office, the defendant Chancellor took out 50*l.* in notes from a strong box, in the presence of the plaintiff, his foreman, Chapman, and the workmen. That the notes were handed to the plaintiff, after he had signed a receipt for the same, and he and the workmen left the office together.

Paragraph 24 of the answer stated, that the defendants had not, prior to the 11th of December, put in force the fifth condition of the contract; but that it would have been necessary for the defendant Copland to have put in force the said condition, had not the plaintiff *voluntarily*, by his agreement of the 11th of December, abandoned the contract, and put the defendant Copland in possession of the works.

Argument.

Mr. Bacon, Mr. W. D. Lewis, and Mr. Druce, for the plaintiffs. It is not pretended that the work was ill done; it is not pretended that the defendants proceeded under the fifth condition, the object was to get rid of the plaintiff and his contract altogether; and the ingenious device of setting his workmen on him was adopted.

The question is, whether the clause in the contract that makes the architect sole judge will protect the transaction of the 11th of December. It is proved by the

evidence, that the defendants knew the plaintiff was pressed for money; that at the time there was, on their own showing, more than 120*l.* due to him. The architect refused to give him a certificate at all, unless he agreed to give up a beneficial contract, and even then only gave him 50*l.* It is clear, unless the letter of the 11th of December defeats the plaintiff's right, he is entitled to relief, but it is submitted that that agreement so procured cannot be sustained in the Court.

The only question was as to the plaintiff's right to damages for the loss he had sustained; but even before the 21 & 22 Vic. c. 27, the Court had power to award damages: *Phelps v. Prothero* (a). In some cases no amount of money can compensate a plaintiff for what is threatened to be done, and therefore the Court interferes by injunction. Once admit the principle, and in this case there would be no difficulty of ascertaining the proper sum.

[*Nelson v. Bridges* (b), was also cited (c).]

Mr. *Malins* and Mr. *Osborne*, for the defendants.—The plaintiff is not entitled to be heard in this Court, inasmuch as it was his inability to perform his contract, which he admits, that made it necessary for the defendants to have it completed in some other way.

It was not the defendant's fault that the plaintiff's workmen insisted on being paid their wages, and put what the plaintiff calls pressure upon him. What was Chancellor? He was agent for Mr. Copland, and was bound to exercise the powers the terms of the contract gave him, in order to protect his employer. It was not suggested that he had any corrupt motive, but, if so,

(a) 7 De G. M. & G. 722.

(b) 2 Beav. 239.

(c) See *Kemp v. Rose*, Vol. I. ante 258.

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it was clear the plaintiff's bill must be dismissed: *Scott v. The Corporation of Liverpool* (a).

But, secondly, the plaintiff had acted on the arrangement of the letter of the 11th of December, and it was too late now to impeach it.

[*Ambrose v. The Guardians of the Dunmow Union* (b) was also cited.]

Judgment. THE VICE-CHANCELLOR:—

The question is, whether the plaintiff's signature to the letter of the 11th of December was fairly obtained by the defendants?

The facts are these. In August, 1858, the plaintiff contracted to erect the building for a specified sum; and, as is not unusual in building contracts, he agreed to abide by the decision of the architect as to the manner of constructing the work, as to the quality of the materials to be used, and as to the time and mode of payment. The terms of the contract, though extremely stringent, do not materially differ from those ordinarily introduced into contracts of this kind. There is no stipulation (such as is sometimes imposed) for a forfeiture of work done in the event of non-performance by the contractor within a specified time. Here the fifth condition provides, that if the contractor should be unable to complete the works by the time limited, the architect may complete the building, and charge the contractor for labour and materials employed.

The plaintiff, as he alleges, entered into the contract in the expectation of receiving elsewhere the sum of 600*l.*, which he intended to employ in this work. He was, however, disappointed in receiving that sum, and consequently experienced great difficulty in obtaining funds to perform the work. This circumstance is relied

(a) 1 G. 216; s. c. on appeal, 3 De G. & J. 334.

(b) 9 Beav. 508.

on by the defendant as showing that the plaintiff was unable to proceed with his undertaking. On the 30th of November the work was in such a state that the architect gave the plaintiff a formal notice of his intention to proceed under the fifth condition, and to complete the building at the plaintiff's expense. It is to be regretted that the architect did not proceed on that notice. Instead of proceeding in that course, the defendant Copland, for whom the house was building, and the architect and perhaps his partner, determined to get rid of the plaintiff and his contract altogether. If this course had been taken openly on fair and just terms, the plaintiff could have had no ground of complaint. But what the plaintiff complains of is, that an unfair advantage was taken of his situation to induce him to sign a letter agreeing to abandon his contract on unfavourable terms.

The terms on which, in that letter, the plaintiff agreed to abandon his contract, were such as no one would have willingly adopted. By these terms, the plaintiff agreed to abandon the contract altogether, and to accept payment for the work performed upon a valuation, and so far there was nothing unfair in the arrangement. But then the agreement went on to provide, not that the plaintiff should be paid for all the work which Gardner approved of and valued, but only for such work as Chancellor approved of; therefore the terms of the letter are highly unfavourable to the plaintiff.

As to the circumstances under which the plaintiff signed the letter of the 11th of December, it is clearly proved that on the 11th of December, and for the previous fortnight, he was so much in want of money that he was unable to pay his workmen, and that the workmen complained that they were starving. Both the defendants, Copland and Chancellor, well knew that the plaintiff was under this grievous pressure. In this state

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of things, the plaintiff requested an advance of 120*l.*, to which he alleged, on a fair valuation of the work done, he was entitled. He was told that this demand was unreasonable. But the evidence shows that this was not an unreasonable, but a fair and just demand. According to the defendants' own evidence, three-fourths of the value of the work done would have been a fair amount to advance, but at that time, according to the defendants' own evidence, the amount of work done was of the value of 437*l.*, and the plaintiff had received 225*l.*, leaving a balance for the work done of 162*l.* Three-fourths of that sum would be about 120*l.*, which was what the plaintiff asked to have.

Instead of paying the plaintiff what they admit would have been a fair proportion of the amount due, the defendants, well knowing the pressure he was under for want of funds and from the demands of his starving workmen, only consent to pay him 50*l.*, on the hard terms of his abandoning the contract altogether, and submitting to be paid for the work done and for the materials supplied, according to the arbitrary decision of Chancellor. Where an agreement, hard and inequitable in itself, has been exacted under circumstances of pressure on the part of the person who exacts it, this Court will set it aside.

But the case does not end there. On the evening of the 11th of December, Chancellor, on going to his office, found the plaintiff besieged by his unpaid workmen, who knew that the payment of their wages depended on the plaintiff obtaining money from Chancellor. When Chancellor had got the plaintiff in his private room and offered to pay him 50*l.* on his signing the document, the plaintiff was desirous of getting away before signing the paper, but one of the workmen, named Bowman, prevented him from leaving the room until the plaintiff

signed the letter of the 11th of December. It has been said that Chancellor had no part in exciting the workmen to clamour for their wages. But be this as it may, he knew the pressure under which the plaintiff was put, and from which the payment of the 162*l.*, which, according to the defendant's own evidence, was then due to the plaintiff, would have released him. An agreement, exacted under such circumstances, is unfairly obtained, and should be set aside.

Then it is said that, even supposing the agreement unreasonable, it has been deliberately acted on by the plaintiff, and cannot therefore now be impeached. But the way in which the agreement was acted upon seems very objectionable. When the plaintiff wished to go over the work with Gardner, he was told he must not interfere, and was advised to withdraw, which he did, leaving Chancellor to point out the defects. If there was impropriety in the circumstances under which the plaintiff's signature of the agreement was obtained, what occurred during the four or five days which succeeded did not repair that defect.

But it is a circumstance fatal to the defendants' case, that although the valuation of the work was made by Gardner, subject to Chancellor's arbitrary decision, it appears that, at the time the defendants refused to advance to the plaintiff in his difficulties more than 50*l.*, there was due, even on Gardner's valuation, 437*l.* 3*s.* 8*d.* for work done, and 57*l.* 10*s.* 4*d.* for materials supplied, of which he had received only 225*l.*

On the whole case, therefore, it seems to me impossible to allow this agreement to stand.

Gardner's valuation, made, as it was, under the dictation of Chancellor, must also be set aside.

It has been contended that, under the agreement, the decision of Chancellor was final, and the authority of

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Judgment.

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Scott v. The Corporation of Liverpool has been invoked. In this case, I do not consider that I am departing from the principle of the decision of *Scott v. The Corporation of Liverpool*, for where, by the terms of the contract, the decision of an arbitrator is made conclusive, and that decision is fairly and impartially given, however severe it may be in its effects, this Court will not interfere, because it will not make a new contract for the parties. That is the principle laid down in *Scott v. The Corporation of Liverpool*. But where an architect, or surveyor, in his judicial character, is proved to have acted unfairly or partially, this Court will relieve against such an exercise of his judicial powers.

There remains only the question of damages. The plaintiff claims to be indemnified for the loss of the profit he would have derived from completing the contract, and the case of *Prothero v. Phelps*, before the Lords Justices, has been adduced as establishing that, apart from the late Act (1858), this Court had power to award damages; but, admitting the jurisdiction of this Court, it is not a case in which the Court ought to award any damages to the plaintiff for the loss of the contract. The decree must be as follows:—Declare that the plaintiff is not bound by the letter of the 11th of December, or by the subsequent proceedings. Declare that the contract of the 13th of August, in the pleadings mentioned, has been determined, and is no longer binding upon the parties thereto. Decree an account of all sums properly expended by the plaintiff for labour and materials in the construction of the premises and dwelling-house in the pleadings mentioned; and if it shall appear that the amount of the sums so paid by the plaintiff shall exceed the sum of 275*l.*, order that the balance be paid by the defendant Copland to the plaintiff. Tax the plaintiff his costs up to, and including the decree. Liberty to apply.

ALLEN v. WEBSTER.

1860.

April 28th.

IN this case, a question on the construction of the will of William Kitchin was raised by demurrer. The bill set forth the facts as follows:—

William Kitchin, the testator, by his will, dated the 5th of March, 1824, after directing payment of his just debts and funeral and testamentary expenses, made the following disposition:—"I give and bequeath all those my three several leasehold messuages or tenements and premises, with their appurtenances, in Drury Lane, in the county of Middlesex, and now in the several leases and occupations of John Lane and James Beavan, or their under-tenants and assigns, and all my present and future terms of years estates thereunto. I give and bequeath and devise unto my daughter Ann Kitchin, now of Eastbourn, spinster, one-half of the rents and profits of my three houses in Drury Lane, independent of any husband, should she marry, to be for the benefit of her children. I give and bequeath and devise unto Frances Rennie the other half of the rents and profits of my three houses in Drury Lane, in consideration of cancelling a deed of settlement made by me on the house in the occupation of John Lane. I also devise and desire that my daughter Ann Kitchin and Frances Rennie bear equally every expense of the said houses in Drury Lane, share and share alike; and if my daughter Ann Kitchin should die first, all the said profits and rents to be the property of Frances Rennie after my daughter's funeral expenses are paid. At the decease of Frances Rennie, after her funeral expenses are paid, all her property, excepting her wearing apparel, to be the property of my

Where a testator, in his will, calls the son of his own illegitimate son his grandson, having no legitimate son, after giving his property to be divided between his son and daughter's children, and if there should be no grandchildren, then a gift to his nephew—the Court held that a legitimate daughter of the testator's illegitimate son was within the description of grandchildren.

Question of construction decided on demurrer.

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daughter Ann Kitchin. I also will and bequeath and devise all my property, real and personal of every description, to be equally divided between my daughter Ann Kitchin and Frances Rennie; and I also appoint my said daughter Ann Kitchin and Frances Rennie whole and sole executrixes of this my last will and testament, revoking all other wills without law or suit against my executrix by any one. I will and bequeath to my grandson, son of William Willy Kitchin, 10%. If my daughter marry and have children, it is my desire that, after her decease, all the property of the said houses to be equally divided between my son and daughter children; and if there should be no grandchildren, then I bequeath and devise all my three houses to my nephew William Henry Allen to him and his heirs for ever."

The testator died in March, 1825, and on his death Frances Rennie received one-half the rents of the three leaseholds, and continued to do so until the 13th of November, 1838, when she died a spinster, leaving Ann Kitchin her surviving. Ann Kitchin, on the death of Frances Rennie, received the entirety of the rents until the 22nd of April, 1859, when she died also a spinster.

The testator William Kitchin was never married, and consequently his son William Willy Kitchin was illegitimate. This illegitimate son married and had two children, Henry Kitchin and Ann Kitchin, afterwards Ann Haines, widow, and afterwards died, leaving Henry Kitchin, who died an infant and unmarried on the 10th of June, 1825, and Ann Haines. The bill was filed by the executors of William Henry Allen against the personal representatives of the testator and against Mrs. Haines, and the trustees of her marriage settlement, praying that the trusts of the will might be carried into execution. The bill also prayed that it might be declared

that the plaintiffs were entitled to the three leasehold houses.

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—
Argument.

Mr. *Craig* and Mr. *Steere*, for the plaintiffs.

The Court would not place the plaintiffs in the unfair position of determining the question of construction on demurrer. There might be evidence to explain the testator's exact meaning, which it would have been most improper to introduce in the bill, and which would therefore not appear on the demurrer.

Even the authorities, which seemed in favour of the defendants' argument, required "that the construction should be quite clear:" *Brownsword v. Edwards* (a). Where there is any doubt on the construction of the will, the practice of the Court was, to overrule the demurrer, without prejudice to the defendants' insisting on the same matters by way of answer: *Mortimer v. Hartley* (b).

Ann Haines alone demurred to the bill, on the ground that, on the allegations of the bill, it appeared that the plaintiffs had no interest.

Mr. *Malins* and Mr. *W. W. Cooper*, for the demurrer, submitted, that on the construction of the will, as set out in the bill, the plaintiffs had no interest. The testator called the son of William Willy Kitchin, his "grandson." The word "grandchildren" must be taken to mean, the legitimate children of William Willy Kitchin. If that construction were adopted, the gift to the nephew failed, and the plaintiffs had no interest in the property sought to be administered.

THE VICE-CHANCELLOR:—

Judgment.

The only question raised by this demurrer is, whether

(a) 2 Ves. sen. 242.

(b) 3 De. G. & Sm. 316.

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on the facts stated by the bill, the plaintiffs are entitled to a decree against these demurring defendants.

The demurrer rests upon the ground that, in the events that have happened, upon the facts stated in the bill, and upon the true construction of the will, the plaintiffs have no interest whatever.

Generally, there is inconvenience in deciding a question of construction upon a demurrer. But, if a bill be demurred to, and the whole right of the plaintiff to sue depends upon the construction in his favour of the instrument which he avers is the foundation of his title, the duty of the Court is to allow the demurrer, unless it appears, from any facts stated in the bill, that there still remains some ground of relief upon which the plaintiff can ask the assistance of the Court.

The formal objection to this demurrer entirely fails. The only right of the plaintiffs to file a bill is that, if there should be no grandchildren, the plaintiffs are the ultimate legatees; and they, being the executors of William Henry Allen, contend that, upon the events which have happened, and on the true construction of the will, they are now entitled to this leasehold estate.

The will is very inaccurately framed, and is of somewhat difficult construction. But, taking what it does say unequivocally, and construing what is obscure and doubtful by the light of those portions where the meaning is clearly expressed, it must be taken to prove the testator's intention that, upon the death of Ann Kitchin, the estate should not go to William Henry Allen, if there were any person or persons who answered the description of grandchildren. On this point the language is perfectly clear and unambiguous. "If there should be no grandchildren, then I bequeath and devise all my three houses to my nephew William Henry Allen." The only question, then, is, whether there is in exist-

ence any person who can claim under the description of grandchildren, taking the word "grandchild" to mean, or rather the class of "grandchildren" to include, a person who is described as a grandson in the will. The testator had a natural son, William Willy Kitchin; and that William Willy Kitchin had a son whom the testator in his will calls his grandson; for he says, he wills and bequeaths a certain sum of money "to my grandson, son of William Willy Kitchin." There is, therefore, no doubt that the testator described the child of his illegitimate son as his grandchild; and if so, where he afterwards in his will speaks of his children, it is difficult to say that any legitimate child of that illegitimate son is not included in the class of grandchildren. He says, "If my daughter," that is, Ann Kitchin, "marry and have children, it is my desire that, after her decease, all the property of the said houses to be equally divided between my son and daughter children, and if there should be no grandchildren, then I bequeath and devise all my three houses to my nephew, William Henry Allen." It is contended, that no grandchildren could take, unless the daughter married. If the daughter married, then, who were to take? Why, the children of the testator's son and daughter. But it is quite clear that the gift over to William Henry Allen was only to take effect in case there was a total failure of those described as grandchildren. I think it is plain enough that the children of the testator's natural son are express objects of his bounty, by the description of children of his son. For he says the property is to be equally divided "between his son and daughter children." Generally speaking, this Court will not permit illegitimate children to take under the description of children, where there are legitimate children also to take. But this is not a case of illegitimate children at all. If the testator had devised

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to his own children, his natural children would not have been allowed to take along with his legitimate children, unless there were clear language sufficiently to describe the natural children. This is the case of a gift to the children of a particular person. It is certain who that person is. These children are to take as a class, and I think that the children of the son are also to take as a class; and that when the testator talks of grandchildren, he means the legitimate children of his own illegitimate son.

This seems the true construction, according to the events which have happened, because the testator says that his property is to be equally divided between his son and daughter's children. There is no doubt that his illegitimate son is described as his son; and no doubt that William Henry Allen could not take if there were any grandchild. The question is, whether the legitimate daughter of an illegitimate son is a grandchild; and, inasmuch as the testator has called the son of an illegitimate child a grandson, it is impossible to say that there are no grandchildren within the meaning which the testator has given to the word *grandchildren*, when there is a daughter of an illegitimate son. This seems to be the true construction of the will. Looking at the gift over, that William Henry Allen was only to take on failure of those persons who are to take on failure of grandchildren, my opinion is, that Mrs. Haines is entitled to this property under this description, and that the event has not occurred under which the plaintiffs could have become entitled.

Demurrer allowed.

MICHELMORE v. MUDGE.

1860.

April 30th.

THIS bill was filed by creditors, to administer the estate of William Mudge, against the widow of William Mudge, who claimed to be entitled by survivorship under the will of Thomas Tracey to the moiety of two sums of 800*l.* and 400*l.*, secured by deposit of the title deeds. By an indenture dated the 3rd of July, 1831, Thomas Butland, in consideration of 800*l.* paid by George Tracey, assigned certain messuages, lands, &c., at Diptford, in Devonshire, for the residue of a term of 2000 years to a trustee for Tracey, on trust, that if he, the said Butland, or his executors, should not within six calendar months from the day when notice of demand for payment should be delivered to him, or his executors, pay the said sum with interest and costs, it should be lawful for the said Tracey, his trustee, &c., to sell the said premises, and to stand possessed of the purchase-money, and the rents and profits thereof until such sale, on trust, in the first instance, to reimburse himself all costs, charges, and expenses, and then to pay to the said George Tracey, his executors, administrators, or assigns, the said sum of 800*l.*, with interest thereon.

The transfer by a husband of title deeds, of which his wife was equitable mortgagee, to secure a debt of his own, is not a reduction into possession so as to defeat the right of the wife by survivorship.
Bates v. Dandy (a),
Honner v. Morton (b),
Hutchings v. Smith (c),
 considered.

George Tracey bequeathed, *inter alia*, the said mortgage debt and security to his brother Thomas Tracey, for his own use and benefit.

By an indenture dated the 1st of May, 1842, in consideration of 300*l.* advanced by Thomas Tracey to John Emmett, certain lands, &c., at Ipplepen, Devonshire, were assigned to a trustee for a term of 3000 years, on trust for sale, to secure the said sum of 300*l.*

(a) 2 Atk. 207.

(b) 3 Russ. 85.

(c) 9 Sim. 137.

1860.
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Statement.

By an indenture dated the 2nd of February, 1848, the premises were charged with payment of a further advance of 250*l*.

John Emmett subsequently paid two sums of 60*l*. and 290*l*.

Thomas Tracey, by his will, having given certain legacies, gave and bequeathed all the rest, residue, and remainder of his money and securities for money to his two daughters, Mary the wife of William Mudge, and Elizabeth Tracey, in equal shares, for their own use and benefit. He appointed his two daughters his executrices.

On the 1st of July, 1850, a deed of partition was executed between William Mudge and Mary his wife of the one part, and Elizabeth Tracey of the other part, whereby it was agreed to divide the clear residuary personal estate of the testator equally between the said Mary Mudge and Elizabeth Tracey, in severalty. It was also agreed that such of the said mortgage debts, as were comprised in the second schedule, should be the share of the said Mary Mudge, and should be taken and accepted by the said William Mudge as and for such moiety accordingly.

Elizabeth Tracey, at the request of William Mudge, assigned to the said William Mudge, his executors, administrators, and assigns, all that the undivided moiety of her, Elizabeth Tracey, in the said monies (the mortgage debts), with the securities for the same.

William Mudge received the whole of the interest on the mortgage debts from the execution of the deed of partition until his death in February, 1858. Prior to his decease, he deposited part of the title deeds of the property comprised in the security of the 3rd of July, 1831, with one Thorn, in order to secure 300*l*. due from himself. He also deposited the title deeds of the property comprised in the mortgage of the 1st of July, 1841,

with the National Provincial Bank of Totness, accompanied with a memorandum of deposit, signed by himself, to secure the balance of his current account with the bank. He afterwards deposited another part of the property comprised in the indenture of July; 1831, with the bank for the same purpose, but without any written memorandum. The rest of the title deeds of the Diptford property were in possession of William Mudge at his death.

William Mudge, on his death, was found to be insolvent. Letters of administration of his estate were at first taken out by his brother, who died, upon which administration with the will annexed was granted to a creditor named Browse.

At William Mudge's death the 800*l.* on the Diptford property was still due, and 400*l.* on the mortgage of the 1st of July, 1841.

The creditors, suing on behalf of themselves, and others, had paid off Thorn and the National Bank, and had possession of the deeds deposited by Mudge.

Mr. *Southgate* and Mr. *F. J. Wood*, appeared for the plaintiffs, and took no part in the argument.

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Argument.

Mr. *Malins* and Mr. *Keene* for Mrs. Mudge.

It is well settled that an assignment by the husband of his wife's chose in action is not sufficient to defeat the wife's title by survivorship: *Purdew v. Jackson* (a). In *Howman v. Corie* (b), where, in order to discharge lands which were subject to a charge of 400*l.* in favour of a married woman, the landowner covenanted with the husband to pay the 400*l.* to free the land. On the husband's death before payment, it was held that the wife, and not the husband's executor, was entitled.

(a) 1 Russ. 1, see pp. 19, 20.

(b) 2 Vern. 190.

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The same principle was adopted in *Hutchins v. Smith* (a); *Ellison v. Elwin* (b); and *Ashby v. Ashby* (c).

Mr. *Eddis* appeared for the heir-at-law.

Mr. *Stapleton* appeared for other parties.

Mr. *Bacon* and Mr. *Knox*, for the creditors.

It is quite clear that the opinion of Lord Hardwicke, in the case of *Bates v. Dandy*, was in favour of the assignment by the husband being sufficient to bar the right of the wife (d); and in *Honner v. Morton* (e), Lord Lyndhurst expressly decided the point. It is admitted that there is a direct conflict in the authorities; but it is contended that the right principle is, that where the husband assigns his wife's chose in action for valuable consideration, the wife's right by survivorship is barred.

[*Johnson v. Johnson* (f), and *Scarpellini v. Atcheson* (g), were also cited.]

Judgment.

THE VICE-CHANCELLOR:—

The difficulty in this case arises from a conflict in the authorities by which the rights of the parties are to be determined.

In the case of *Honner v. Morton* (h), Lord Lyndhurst seems to have considered that, where a husband has the present right to reduce into possession a chose in action of his wife, his assignment must be treated as a reduction into possession, and operates forthwith so as to deprive the wife of her right by survivorship. This view of the law has not been followed by later judges, neither does it appear to have been entertained before Lord Lyndhurst's decision. Lord Hardwicke, in *Bates v. Dandy*,

(a) 9 Sim. 137.

(b) 13 Sim. 309.

(c) 1 Coll. C. C. 553.

(d) 2 Atk. 207, and 3 Russ.
(note) 72.

(e) 3 Russ. 85.

(f) 1 J. & W. 476.

(g) 7 Q. B. 864.

(h) 3 Russ. 85.

undoubtedly said that a husband may assign his wife's chose in action or possibility, as well as her term, provided it be not voluntary, but for valuable consideration. In *Purdew v. Jackson*, Sir Thomas Plumer, during the argument, asked Mr. Sugden and Mr. Shadwell, who were the counsel engaged, whether there was any case in which the husband, after executing an assignment of his wife's chose in action, had died before the assignee obtained possession, and in which it had been held that the wife's title by survivorship was defeated by the assignment. Both Mr. Sugden and Mr. Shadwell expressed their belief that no such case had occurred. Sir Thomas Plumer himself appears to have concurred in that view of the law, which is wholly irreconcilable with the decision of Lord Lyndhurst and the dictum of Lord Hardwicke.

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Judgment.

In *Ellison v. Elwin*, Vice-Chancellor Shadwell had not only to consider, but to decide the question, and he held that, where there is an assignment of a wife's chose in action, with a present right to reduce it into possession, unless there be an actual reduction into possession during the husband's life, the wife's right by survivorship is not defeated by the assignment.

In the present case, the only act of the husband which can be urged as a reduction into possession was, his dealing with the title-deeds, which were in his possession in right of his wife, who was the mortgagee. These title-deeds were unquestionably chattels which the husband held in right of his wife. He had the present right to call in the mortgage monies, and if he had done so, the right of the wife would have been wholly extinguished.

But, what the husband did, was to receive a part of the mortgage money, and—having in his possession the title-deeds, which were his wife's chattel, though held only as a security for money—he deposited these deeds

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Judgment.

for his own benefit in the hands of a person who held them as a security by way of equitable mortgage.

As to so much of the money as was actually received by the husband, there was a complete reduction into his possession, so as to defeat the wife's title by survivorship. But as to the rest, the mere possession of the deeds cannot be equivalent to possession of the money. If the husband's possession of the deeds is not sufficient to bar the wife's right, his transfer of that possession cannot on principle make any difference. In order to defeat the wife's title, it must be shown that the assignee exercised the right which he acquired by the deposit of the title-deeds. But nothing of the kind was done, and, therefore, the transaction amounted to nothing more than the deposit by the husband of his wife's chattel as a security for his debt, with a right in the assignee to reduce the property in possession, which was not exercised. Then how does the case now stand? The husband died, leaving the right of reduction into possession unexercised by himself or his assignee, and therefore the title of the wife, by survivorship, arose on his death.

In *Hutchings v. Smith* (a), Sir L. Shadwell completely answers the dictum of Lord Hardwicke in *Bates v. Dandy* (b), and the judgment of Lord Lyndhurst in *Honner v. Morton* (c). *Hutchings v. Smith* was a case in which the personal property of the wife consisted of a fund outstanding in Court, which, by a decree of the Court, after the husband's death, had been ordered to be paid to the widow, the assignment having been made during her husband's life. Sir Lancelot Shadwell used this language:—"It appears to me that there is an important difference between the case where the chose in action is fluctuating, and the case where there has been a decree directing it shall be paid to the wife who has survived her husband."

(a) 9 Sim. 137.

(b) 2 Atk. 207.

(c) 3 Russ. 85.

In the present case, the wife, who survived her husband, was one of the executors under the will of the person of whose assets the mortgage money formed part. That, it is true, gave her but a dry legal right; but the circumstance that she was an executrix seems quite as strong in her favour as the circumstance in the case before Sir L. Shadwell, that there was a decree directing payment to the wife.

Neither in that case, nor in this, has there been any actual reduction into possession, and consequently the right of Mrs. Mudge is unaffected by the husband's transfer of the title-deeds.

1860.
MICHEL-
MORE
v.
MUDGE.
Judgment.

Re THE ROYAL BANK OF AUSTRALIA.
Ex parte DRUMMOND.

Re THE WINDING-UP ACTS 1848-49.

May 22nd.

IN this case Sir F. W. Drummond took 120 original shares in the Royal Bank of Australia, and executed the deed of settlement for that amount. He subsequently purchased twenty shares. At his death in February, 1844, the 140 shares were standing in his name.

It was at first assumed that Sir F. W. Drummond had died intestate, and his eldest son, as heir-at-law, succeeded to the heritable property, and was also confirmed executor to his father in Scotland and administrator in England of the personal estate.

On the 27th of November, 1847, Sir James Drummond paid a call of 5*l.* a share, and on the 4th of September, 1848, paid another call of 2*l.* 10*s.* a share.

On the 26th of March, 1848, the bank was ordered to be

"Accepting trustees" under the Scotch law, to whom shares in the bank had been on express terms assigned by the testator—*Held*, to be properly placed on the list of contributories.

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 AUSTRALIA.
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 ———
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wound up. The official manager placed Sir James's name on the list of the contributories, and on the 5th of July, 1854, a call was made upon him and the contributories of 100*l.* a share. An order was obtained on the 9th of August, 1854, whereby Sir James, as executor of his father, was ordered to pay the call amounting to 14,000*l.* within seven days.

On the 11th of March a "judicial factor" was appointed of Sir Francis Walker's estate.

The call not having been paid, the official manager presented a petition to the Court of Session, in order to obtain sequestration of Sir Francis' estates. The proceedings were against Sir James Drummond and the other parties who represented the successors of Sir Francis.

On the petition it was held, that in order to obtain sequestration, the relation of debtor and creditor must subsist, which in this case the Court of Session never exacted.

This decision was affirmed in the case of *Wryghte v. Lindsay*.

On the 28th of February, 1857, the trust-deed executed by Sir Francis was declared to be valid.

In April, 1857, "the accepting trust disponers and executors" presented a petition to the Scotch Court, on which the judicial factor was discharged.

On the 20th of April, 1860, the Master placed the names of the accepting trustees on the list, but did not remove that of Sir James Drummond.

Argument.
 ———

Mr. Bacon and Mr. Baggallay moved to take the names of the accepting trustees off the list. The House of Lords had decreed that the relation of debtor and creditor did not subsist between the official manager and Sir Francis W. Drummond. The character in which they represented Sir F. W. Drummond's estate was neither

within the language nor the meaning of section 3 (a) of the Winding-up Act, 1848. Moreover, if they represented any estate of Sir F. W. Drummond's, it was one which could not be recognised by this Court.

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Mr. *Malins*, Mr. *Daniel*, and Mr. *Roxburgh* appeared for the official manager.

Argument.

THE VICE-CHANCELLOR said, he thought the Master was right, on the ground that there was an express assignment of these very shares to the accepting trustees.

Judgment.

(a) "The word 'contributory' shall include every member of a company, and also every other person liable to contribute to the payments of any of the debts, liabilities, or losses thereof, whether as heir, devisee, executor, or ad-

ministrator of a deceased member, or of a former member of the same, or as direct devisee, executor, or administrator of a former member of the same deceased, or otherwise howsoever."

1860.

May 1st.

Where a testator, having given all his personal estate to his executrix absolutely, directed all his debts, &c., to be paid by his executors out of his estate, and devised his real estates, which were subject to a mortgage, for the benefit of his children—*Held*, that on the true construction of the statute 17 & 18 Vic. c. 113, the direction to the executors to pay the debts, exonerated the devised estate from the mortgage debt.

WOOLSTENCROFT v. WOOLSTENCROFT.

IN this case, Robert Woolstencroft, by his will, dated the 27th of June, 1855, made the following disposition:—"All my debts, funeral and testamentary expenses, shall be paid by my executors out of my estate." The testator then gave and bequeathed all his personal estate, except his leaseholds, to his wife absolutely; and he then devised, bequeathed, and appointed all his real and leasehold estates unto J. Brown and W. Edmunds, their executors, administrators, and assigns, according to the nature and quality thereof, upon certain trusts for his wife for life, and on her death for his children. He appointed his trustees and his widow executor and executrix of his will, who attested and proved the will.

The testator died on the 26th of July, 1855. In June, 1859, this bill was filed by his infant children to administer the trusts of the will. The common administration decree was made, and it was referred to chambers in the usual way to make certain inquiries, and to settle a scheme for the maintenance of the infants. The chief clerk, under the reference, certified that a portion of the real and leasehold estates was subject to a mortgage for 300*l*.

The question now came by adjourned summons from chambers, appealing against the chief clerk's decision, on the ground that there was a "contrary intention" signified by the will so as to except the case from the operation of the recent statute, 17 & 18 Vic. c. 113(*a*).

(*a*) "When any person shall, after the 31st of December, 1854, die seised of or be entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not by his will, or deed, or other documents

Mr. *Malins*, Q.C., and Mr. *Cole* submitted that there was nothing in the will to indicate the contrary intention specified by the statute.

1880.
WOOLSTEN-
CROFT
v.
WOOLSTEN-
CROFT.
Argument.

Mr. *Bacon*, Q.C., and Mr. *Eddis* contended that the direction that all the debts should be paid out of his estate by his executors, indicated an intention that the real estate was to be exonerated.

Mr. *Kay* appeared for the trustee.

THE VICE-CHANCELLOR:—

Judgment.

The Act expressly declares that a mortgaged estate must bear the burden imposed upon it, unless there is a contrary or other intention shown signified by the will.

If a testator intends that the devise of an estate subject to a mortgage is not to satisfy that mortgage, the plainest mode of signifying that intention is to direct that the debt is to be paid by some other person. In this case the testator has plainly directed that his executors are to pay all his debts, a direction that must mean that some other person than the devisee is to pay this particular debt.

have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debts discharged or satisfied out of the personal estate or other real estate of such person; but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged—every part thereof, according to its value, bearing a proportionate part of the

mortgage debt charged on the whole thereof: Provided always, that nothing herein contained shall affect or diminish any right of the mortgagees on such lands or hereditaments to obtain the full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying or otherwise: Provided also, that nothing herein contained shall affect the right of any person claiming under or by virtue of any will, deed, or document already made or to be made before the 1st day of January, 1855."

1880.
WOOLSTEN-
CROFT
v.
WOOLSTEN-
CROFT.

Judgment.

It has been argued that there is no express mention of this debt; but where the testator expressly directs that all his debts are to be paid by his executors, he indicates that they should be paid by a course of administration different from that pointed out by the Act.

It must be remembered, also, that the testator has given the whole of his personal estate to his widow, who is appointed executrix, so that she had the whole fund applicable for payment of his debts.

I decide this case on the ground that, according to what seems to me the true construction of the Act, if the testator directs payment of his debts by his executors, the mortgaged estate is exonerated.

What this statute interferes with, is the course of payment in the due course of administration according to the old law.

Declare that the mortgage debt must be paid out of the personal estate.

BONSER v. KINNEAR.

1860.

May 7th.

EDWARD HESKETH, by his will, dated the 30th September, 1828, bequeathed all his leasehold property at Edgbaston to his wife Harriet Hesketh, to hold the same for herself, her executors, administrators, and assigns, for all the rest and remainder of his term and interest therein. And as to all other his personal estate, he gave and bequeathed the same to his said wife to and for her own use and benefit, she maintaining, clothing, and educating such of his children as should happen at his decease to be under the age of twenty-one years until they should attain that age; and also paying his debts, funeral expenses, and the charges of proving and executing his will. And he declared it to be his will that, although he had above given the whole of his property to his said wife, yet it was his desire, that if his children conducted themselves to her approbation, she would leave such property equally amongst all his children.

A testator gave his personal estate to his wife, declaring, although he had given her the whole, he desired, if his children conducted themselves to her approbation, she would leave such property equally amongst all his children. The widow, by her will, gave the property to those living at her decease. The Court held, the widow took subject to a trust, and on both wills declared the four surviving children entitled.

At his death the testator left living seven children (several having predeceased him), all of them minors, except Harriet, the wife of Mr. S. Butler. Of the seven who survived the testator, John Hesketh, Harriet Butler and Alfred Butler died in the lifetime of their mother.

Harriet Hesketh (the mother, and the testator's widow) died on the 24th of November, 1858, leaving three daughters and a son. By her will she directed the payment of her debts, and, after giving certain legacies to her three daughters and her son, she bequeathed her leasehold property in Catheryne Street, Edgbaston, and all other the personal estate to which he should be entitled at her decease, to the plaintiff, in trust to invest

1860.
 BONSER
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 —
Statement.

the sum of 200*l.* for the benefit of her daughter Anne Hesketh, in addition to her share thereafter bequeathed, and, subject thereto, in trust for her four children equally.

In April, 1858, Mr. S. Butler became bankrupt.

This bill was filed by the plaintiffs as trustees of Harriet Hesketh the widow, against the assignees of Butler and the representatives, and the children of the testator and their representatives; praying for a declaration of the rights of the parties.

There was no legal personal representative of John Hesketh.

Argument.
 —

Mr. *Elmesly* and Mr. *F. T. White*; for the plaintiffs, submitted the question to the Court whether the widow took the property absolutely or clothed with a trust.

Mr. *Bacon*, and Mr. *S. Smith*, contended that the widow took subject to a trust in favour of all the children, including those who died in the testator's lifetime.

Mr. *Eddis* appeared for the trustees in the same interest.

Mr. *Craig* appeared for the three surviving daughters—whose interest was to exclude children who died before the widow—but was not called on by his Honour.

Judgment.
 —

THE VICE-CHANCELLOR:—

It is impossible to hold that the widow took this property absolutely for her own use and impressed with no trust. There is a clear trust in favour of all or some of the children of the testator.

The word “leave” seems inconsistent with the notion that children dying in the lifetime of the widow could be among the class who were to benefit by the testator's direction to the widow to leave the property to his chil-

dren. Assuming that the widow was a trustee, her duty in executing the trust was guided by a very particular direction that if his children conducted themselves to her approbation, she was to leave them the property. It is quite clear, from this language, that the testator intended she should have some power and discretion.

There seems nothing on the will to justify the construction that she was to leave it to deceased children; inasmuch as several of his children died in his own lifetime.

On the whole case, there seems to be nothing in the will to justify the Court in disturbing what the widow has done. She executed the trust according to her discretion, and, considering the discretionary power which was given to her, it would be going further than the facts of the case warrant, for this Court to interfere with her performance of the trust.

There must be a declaration that, according to the true construction of both wills, the four children are entitled to the whole. Direct the common accounts to be taken (of the widow's estate), and let the bill be dismissed against the other parties, with costs out of the testator's estate.

1860.
BONSER
v.
KINNEAR.
Judgment.

1860.

May 3rd.

Where, on taking an account, a balance was found due to the executor for monies advanced, the estate being insolvent—*Held*, that the executor was entitled to be paid in full, in priority to the creditors.

SPACKMAN v. HOLBROOK.

THIS was a suit instituted by the *cestuis que trust* under the will of Philip Redman, deceased, against his trustees and executors, James Holbrook and R. Hemming, to recover the sum of 3997*l.* 14*s.* 9*d.*, being the balance of the trust estate which had come to the hands of Holbrook, and had been misappropriated by him. Holbrook had since the institution of this suit died insolvent, and R. Hemming had also died, having by his will left all his real and personal estate to his son R. Hemming, the defendant in the supplemental suit, upon trust to pay his debts, &c., and left him his executor and devisee in trust. By a supplemental suit, in which R. Hemming, the son, was defendant, a decree was made for the administration of the estate of the trustee, R. Hemming; and, on taking the accounts of the estate of R. Hemming, the father, the Master found by his report that R. Hemming, the son, had paid on account of the personal estate sums amounting in the aggregate to 597*l.* 18*s.*, and having received on that account the sum of 121*l.* 13*s.* 11*d.* only, that there was due to him on that account the sum of 4760*l.* 4*s.* The Master also found that R. Hemming, the younger, had received on account of real estate the sum of 20,177*l.* 11*s.* 4*d.*, and paid the sum of 17,771*l.* 19*s.* 8*d.*, so that there was due from him on that account the sum of 2405*l.* 11*s.* 8*d.*, which, being taken from the sum of 4760*l.* 4*s.*, left the sum of 2355*l.* 7*s.* 8*d.*, the balance due to R. Hemming, the son, for his disbursements on account of his father's estate. The Master also found the debt due to the plaintiff, and a debt of 2039*l.* 15*s.* to a creditor of R. Hemming, the father, named Brown. The remaining real estates of

R. Hemming, the trustee, had been sold, and the costs of all parties relating to the administration of his estate had been taxed, by order dated April 7, 1856. The purchase-monies, amounting to about 8000*l.*, were now in court, but were insufficient to pay all the taxed costs, the balance due to R. Hemming, the son, and the debts of the plaintiff and Brown in full. The cause came on on further directions.

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—
Statement.

Mr. *Malins*, and Mr. *Whitbread*, for the plaintiff.

Argument.
—

The assets arise from real estate, and are therefore equitable. Hemming, the son, has been overpaid on account of personal estate, therefore he has no legal right to retain his balance, but must come in rateably with the plaintiff and Brown: *Lewis v. Lewis* (a), *Gordon v. Trail* (b). At any rate, he is not entitled to any interest.

Mr. *G. Smith*, for Brown.

Mr. *Bacon*, Mr. *H. Clark*, and Mr. *H. C. Ward*, for Hemming.

The debts paid by Hemming were paid *bond fide*; many of them were bond debts, and bore interest. An executor honestly advancing monies to pay unfortunate creditors, is entitled to priority and to interest on his balance when the estate is deficient: *Small v. Wing* (c), *Hepworth v. Heslop* (d). Besides, the testator made his real and personal estate one fund for payment of his debts.

Mr. *Malins* was heard in reply.

THE VICE-CHANCELLOR:—

Judgment.
—

The Master has found that the payments by the executor are proper, and ought to be allowed. There

(a) 13 Beav. 82.

(c) 5 B. P. C. 66, 72.

(b) 8 Price, 416.

(d) 6 Hare, 561.

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has been no exception taken to the report, which must, therefore, be held binding on the parties.

If the payments are proper payments, the executor surely ought to be repaid the amount which he has advanced in making them, whereby he saved a considerable sum for interest to the estate.

The cases that have been cited were decided on the principle of retainer, and have no application to this case. This is not a question of retainer at all. Any creditor may sue the executor, but the executor, if he is also a creditor, cannot sue himself, and therefore the law allows him a right to retain his own debt—that is, a right to pay himself, by keeping the money of his debtor which has lawfully come into his hands.

The present case is of a different kind. After the testator's death the executor of the trustee, who had become liable to the trust estate by the default of his co-trustee, advanced out of his own monies considerable sums for the benefit of the estate. The parties interested have had the benefit of the payments, which he now claims to be allowed.

The executor must be first recouped the amount he has advanced to the trust estate, and the residue will then become available for the creditors.

COOK v. WAUGH.

1860.

May 7th &
8th.

PRIOR to the 18th of December, 1856, Messrs. Waugh were in treaty for a lease of a house, No. 2, Russell Place, Fitzroy Square, with the plaintiff Robert Cook. A negotiation had been going on as to the repairs, which, it was ultimately agreed, should be done by the plaintiff according to a specification prepared by the defendants, on the understanding that they would take a lease. The specification, *inter alia*, described certain "cracks" in the wall which were to be repaired, but contained no reference to general or substantial repairs.

On the 18th of December, 1856, the parties signed the following memorandum:—Robert Cook agrees to let, and Edgar Achilles Waugh and Rufus Decimus Stephen Waugh agree to take, a lease of No. 2, Russell Place, Fitzroy Square, from Christmas, 1856, for seven years, at the clear yearly rent of 70*l.*, payable quarterly, such lease to contain the usual powers of re-entry, and all such covenants as are contained in the lease under which the said Robert Cook holds the same. The said Edgar A. Waugh and Rufus Decimus Waugh agree to execute a counterpart of the said lease, and to pay all rates and taxes, tenant's or landlord's, except the property tax. The rent to commence on the 1st of February, 1857.

There was considerable conflict in the evidence as to what took place on and after the signing the agreement. E. A. Waugh, who was the active party in the arrangement, deposed that, at or before signing the agreement, he told the plaintiff he must put the house in "substantial repair;" and that he mentioned particularly the state of the walls, and observed that the plaintiff must have them put right. That the plaintiff thereupon remarked, that

Specific performance of an agreement to take a lease decreed where the defendant, knowing that the premises were greatly out of repair, stipulated for certain specific repairs, which were done accordingly, but took possession after being warned that much more extensive repairs were required, and it turned out on examination after he had taken possession, that it was necessary to take down and rebuild a wall at great expense.

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the cracks were of no importance, and only required filling up.

The said E. A. Waugh deposed that he signed the agreement on the faith of this representation.

At the time the repairs were being done, the district surveyor called, when E. A. Waugh happened to be in the house, and went with him into the drawing-room, which was then in process of being papered. The district surveyor thereon remarked, that it was a pity to paper the walls, as they were unsafe, and eighteen inches out of the perpendicular, and required underpinning. The defendants alleged, that in consequence of this opinion of the district surveyor, they called on the plaintiff, and told him of the surveyor's opinion. The plaintiff, in reply, assured them, that the walls were quite safe, and had been thoroughly repaired and underpinned about three years before. The defendants thereon insisted on having the foundations examined, which, as they alleged, the plaintiff promised should be done, but which he denied having promised.

On the 4th of February, 1857, the defendants entered into possession of the house, and paid the plaintiff for extra repairs, which he had done at their request, and paid the rent in pursuance of the agreement up to Christmas, 1857.

In March following, the district surveyor served a notice on the defendants, that the party wall between the houses, Nos. 1 and 2, should be secured. This notice they returned to the surveyor, stating that they were tenants only, and that the landlord was the proper party to apply to. The surveyor then called on the plaintiff, and some steps were taken to underpin the house No. 2, but ultimately the district surveyor required the party-wall to be rebuilt, and gave information to the Commissioners of Police that the house was in a dangerous state.

On the 24th of March, the defendants gave notice to

the plaintiff that they intended to quit and give up possession of the house, stating also, that if the same was put into safe and tenantable repair, they would return to it when certified by their surveyor to that effect. That the rent due would be paid, but that they would expect compensation for inconvenience and expense incurred.

The plaintiff, in reply, stated that the defendants were bound to repair, and that he should insist on the contract.

On the 17th of April, 1858, the defendants wrote, stating, that from what the surveyor had said, they did not consider themselves safe, and must leave, and all relations existing between them and the plaintiff must cease. On the 23d, they left the house, and sent the key to the plaintiff, which the plaintiff returned, saying, he would not accept the surrender of the house. Shortly after the defendants left, a notice was affixed to the door by the police, that the house was in a dangerous condition. On the 30th of May, the plaintiff was served with a notice under the Metropolitan Building Act, requiring certain repairs to be done, and ultimately an order of justices. The plaintiff thereupon was compelled to have the repairs done, for which he paid 169*l*.

On the 7th of September, the defendants sent to the plaintiff a cheque for the amount of rent up to the period of their leaving the house. The plaintiff was absent, but his servant gave a receipt, but the plaintiff immediately after returned the cheque.

On the 1st of October, 1858, the plaintiff sent a draft lease of the house to the defendants, together with an application for payment of three quarters' rent up to the preceding Michaelmas, and of a sum of 160*l*. expended by him in repairs. He also called on them to paint and repair, &c., &c., the house when required.

The defendants returned the lease, repudiating all

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liability to the plaintiff, who thereupon filed this bill for specific performance of the agreement to take a lease and for the payment of the rent, and of the sum of 169*l*.

There was adduced on the part of the defendants the evidence of a former tenant, who stated, that he had pointed out the cracks in the wall to the plaintiff, who directed him to have them repaired, which was done superficially. That, some time before he quitted the house, he pointed out to the plaintiff the dangerous condition of the premises, and, in particular, that the joists were not more than half an inch in the party wall.

Mr. *Bacon* and Mr. *Southgate*, for the plaintiff, contended, that the evidence clearly showed that the defendants knew that the premises were out of repair. There was no concealment on the part of the plaintiff, and as to those parts of the case where the evidence was conflicting, the conduct of the defendants, in entering into possession was quite inconsistent with the defence made to this bill.

Mr. *Malins* and Mr. *Langworthy*.—The evidence showed that there was concealment of the condition of the foundations of the house, and therefore the vendor could not come to this Court for specific performance of the agreement. In *Shirley v. Stratton*(*a*), the circumstances of the case were nearly identical. That was a bill for specific performance of an agreement for the sale of an estate on the banks of the Thames; but the vendors industriously concealed that the river wall wanted repairs; and, on a bill by the vendors, the Court refused specific performance, and dismissed the bill, though without costs.

Here the defendants could hardly under any circumstances have discovered the defective state of the founda-

(*a*) 1 B. C. C. 440.

tions; but whatever chance there was of their doing so had been taken away by the plaintiff's representation that the walls had been recently underpinned. They were, therefore, put off inquiry, and, on that ground, the bill must be dismissed: *Drysdale v. Mace* (a).

[*Price v. Macauley* (b), and Sugd. V. & P., p. 279, 13th ed., were also cited.]

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 Argument.

THE VICE-CHANCELLOR:—

The case of the defendants wholly fails. The agreement which the defendants entered into to take this house as the plaintiff's tenants, was made with such knowledge on their part that the house was in a bad state of repair, that, before entering into the agreement to take the lease, there was a preliminary stipulation by the defendants that certain repairs should be done upon the house. The defendants did not think fit, before entering into the agreement, or before specifying what repairs they wanted to employ a surveyor, but acted on their own judgment, and on the best information they could get. The specification of the repairs which the defendants required, is very full; it notices the existence of cracks in the wall, and provides for those cracks being repaired in a particular way. They did not exact from the plaintiff any guarantee, or bind the plaintiff generally to put the house in a state of substantial repair. They might, in their specification, if they had pleased, have said that "in all other respects," or, "in all respects," the plaintiff should put the house into "good and substantial repair." There is, however, no stipulation of the kind. On the contrary, the preliminary agreement was for those repairs to be done, and those only, which were stated by the defendants themselves. Content with that, they deliberately entered into an agreement to take a lease of this house, which was a house with a cracked wall, and

Judgment.

(a) 2 Sm. & G. 225.

(b) 2 De G. M. & G. 339, 346.

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otherwise greatly out of repair. The agreement is perfectly clear and simple. It is not, as has been said, that all the terms of the contract are not in the agreement, because the main agreement was not made or signed by the defendants until after the preliminary agreement had been made, and was in the course of completion.

What the defendants rely upon is, a studied concealment of certain defects known to the plaintiff, and not communicated by him to them. This case has not been proved, for the defects arising from the cracks in the wall, and from the wall being eighteen inches off the perpendicular, were of a kind to arouse the vigilance of any intending lessee, and to make him see that it was necessary for a great deal to be done before the house could be safely inhabited.

If the case rested there, it would be wholly destitute of any evidence of suppression of the truth, or suggestion of what was false, upon the part of the plaintiff, except as to what was mere matter of opinion. The fact of the bad state of repair of the house was apparent from the existence of cracks in the wall; and the cause of those cracks, without an examination of the foundations, could not be accurately or perfectly ascertained. So clear is this upon the evidence, that even the district surveyor (who is the defendants' own witness), did not, until after a great deal had been done, discover that it was necessary to take down the party-wall. Therefore, the defendants' own evidence shows that it was impossible the plaintiff could have concealed the knowledge of that which was unknown even to the surveyor himself until that examination was made which, if the defendants had been persons of reasonable vigilance, they would have taken care to have seen made before they bound themselves by an agreement to take a lease.

The case, however, does not rest merely upon the

defendants having agreed to take a lease, after stipulating that certain things should be done which have been done ; for, before the defendants took possession, the district surveyor was found by one of them, apparently accidentally, in the house, certainly by no appointment of the defendants ; and he, a man of skill, when he found that the walls were being papered according to the defendants' specification, told the defendant that it was a needless process—in fact, told him in plain terms that the wall was unsafe. What do the defendants do upon this ? They go to the plaintiff and tell him the opinion of the surveyor. It was not the plaintiff's business to do anything upon that. The defendants had a perfect right to say, " We cannot, in this state of things, without a thorough examination, take possession or proceed further under the agreement." The defendants' own statement of their case upon this part of it seems decisively against them ; because they say the plaintiff promised to have the foundations examined ; and yet, just when they were taking possession of the house, on the 4th of February, they wrote to say the foundations had not yet been examined.

It was the defendants' business to satisfy themselves upon this question, after having had the opinion of a surveyor ; and, without any further opinion than the plaintiff's saying he would have the foundations examined—a thing he was not bound to do—it was the defendants' own duty, being thus put on their guard, to have examined them before they proceeded further. The bare fact that the defendants took possession after being told the wall was unsafe, and knowing that no examination of the foundations had taken place, seems to me to make it impossible for them to bring their case within the principle of that doctrine, which is very well established, and which I hope will never be weakened—that if a vendor or a lessor is aware of some latent

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defect, and does not disclose it, the Court will consider him as acting in bad faith.

In this case the real extent of the mischief was patent to all parties. It was apparent to the defendants that a party-wall, with extensive cracks in it, was eighteen inches out of the perpendicular. What is certain is, that the defendants were warned that the wall was unsafe, and with all that warning, they took possession of the house, knowing that no examination of the foundations had been made. If they intended to rely on the defective state of the foundations, they ought to have had them examined, and they must not, after having had the opinion of a surveyor that the wall was unsafe, and after deliberately entering into possession of the house, complain that the plaintiff has acted in an unjustifiable manner, and allowed them to put their lives in danger. If their lives were in danger—which does not appear to have been the case in the slightest degree—it was a danger of their own seeking, for they entered deliberately into possession, after having been told that the house was unsafe.

With regard to the evidence in the cause, there are some parts of it, upon which there is a direct conflict, which I think requires some notice. The defendants say and swear that the plaintiff told them that the wall had been underpinned three years before. This the plaintiff has positively denied, and therefore I cannot assume that fact to be proved; but if it were, when was this statement made? Why, at a time when the defendants were informed that the wall was unsafe; and even if the wall had been underpinned, the underpinning might not have been sufficient, and the wall might have given way. But the defendants chose to enter into possession of the house with these great cracks in the party-wall; it being out of the perpendicular as far as eighteen inches. The defendants also say that the plaintiff promised them that the foundations should be examined. This the plaintiff also

positively denies; and, between the denial on the part of the plaintiff and the affidavit of the defendants, it is impossible to consider that fact as proved; and, so far from thinking that the after-conduct of the plaintiff makes it probable, I think the probability is rather the other way; because, if the plaintiff had promised the foundations should be examined, there is a complete waiver of that by the defendant taking possession, without being satisfied that there had been such examination.

Upon the whole, the fact of that statement or promise by the plaintiff that the foundations should be examined becomes wholly unimportant to the case, from the conduct of the defendants themselves. It is not proved; and there is not enough to induce the Court to consider that, upon the weight of evidence, the defendants' version of it is more probable than the plaintiff's.

The case, therefore, is one in which there has been no studious concealment on the part of the plaintiff. The house was in a ruinous state at the time when the agreement was entered into; and (being in that state) the defendants stipulated for certain specific repairs, omitting all stipulation that the whole should be put in substantial repair. All that was stipulated for has been done; and these defendants, therefore, must be decreed to perform their contract, and to pay the costs of this suit, in which they have been wholly unsuccessful up to the time of the hearing. The lease will be dated, of course, on the day of the agreement, and will contain the usual covenants, to be settled in chambers, if the parties differ, with liberty to apply.

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*May 22nd,
23rd & 24th.*

A trustee for sale is bound to obtain the best price for the property. Therefore, where the trustee contracted to sell the estate, though with the consent of all the *cestuis que trust*, except the assignee of one share, for less than was offered by such assignee, the Court annulled the contract, and deprived the trustee of the costs of the suit. *Ord v. Noel (a)*, considered.

HARPER v. HAYES.

THIS bill was filed by the assignee of a share in certain real estates vested in the defendant Hayes on trust for sale, for the purpose of having set aside a contract, by which the defendant Hayes had agreed to sell the estate to one Pearson for the sum of 6000*l*.

By indentures of lease and release, dated the 14th and 15th of November, 1853, the property, which consisted of twelve acres, known as Cuckold's Corner, with five cottages, and a house, called Chapel House upon it, were vested in Henry Hodgetts and Sarah his wife. By an indenture, dated the 28th of July, 1842, reciting that Mrs. Hodgetts had had four children by her first husband Hollis, and four by her present husband, and that she and the second husband were desirous of making provision for all the said children, it was by the said indenture witnessed that the messuages and premises were conveyed to William Hayes and his heirs, upon trust, to the use of the said husband and wife during their joint lives, and the life of the survivor, and, subject as aforesaid, to the use of the said William Hayes, his heirs and assigns, on the following trusts:—

“Immediately, or as soon as conveniently may be after the decease of the survivor of them, the said Henry Hodgetts and Sarah his wife, as aforesaid, to make sale and absolutely convey and dispose of the whole of the said hereditaments and premises, either together or in parcels, unto any person or persons, who shall or may be willing to become the purchaser or purchasers thereof, or as he or they should direct for the most money, or best price or prices that can at the time of such sale or sales be

(a) 5 Madd. 438.

reasonably had or gotten for the same, either by public auction or private contract; provided it shall be lawful for the said William Hayes, if it should be thought expedient, to make any special stipulation or conditions as to the evidence of title to be required by any purchaser or purchasers, and also to buy in the said hereditaments, or any part thereof, at any auction or auctions, and to rescind or vary the terms of any contract or contracts for sale that might have been entered into, and to convey such parts of the said hereditaments as from time to time should be sold, in such manner as the purchaser, or respective purchasers thereof should direct, and from time to time to make, do, and execute all proper acts, deeds, contracts, and assurances for carrying such sale or sales into complete effect." And it was by the said indenture declared, that the receipts of the said William Hayes, his heirs and assigns, should be good and valid discharges for the said purchase monies; and that the said William Hayes should stand possessed of the residue of the said purchase monies, after payment of the expenses, upon trust to divide the same into eight equal parts, and to distribute the same among the eight children in manner thereafter mentioned.

The deed was duly acknowledged by Mrs. Hodgetts. In 1857, by the death of the survivor, the trust for sale arose; all the eight children were at that time living, but they did not at first wish to have a sale, and were therefore let into receipt of the rents and profits in January, 1859. The parties beneficially interested had an interview with William Hayes, who advised them not to have an immediate sale, as there was an objection to the title, which would be removed by delaying the sale for a few years. In the meanwhile, one of the parties interested in the estate opened a negotiation with William Pearson, to sell the estate to him, but it dropped without anything being settled.

Immediately after this interview, Hayes requested

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the *cestuis que trust* to sign a letter calling on him to sell the property by public auction; but one of the parties objecting, this was not done. On the 1st of February, 1859, Hayes, with the concurrence of all the *cestuis que trust*, offered to sell the estate to Pearson for the sum of 6000*l*.

It appeared that there was a mine of coal, "ten yard," and fire-brick, under the land, which made it a desirable acquisition to the plaintiffs, who were the owners of an adjacent colliery. They alleged that their solicitor, Mr. Homfray, applied on several occasions to the defendant, but were informed it had been offered to Pearson for 6000*l*. In 1859, a bill was introduced for a new railway, the station for which it was proposed to place opposite the property, and these circumstances, which would considerably augment the value of the property, made the plaintiffs more anxious to purchase. In February, 1860, Mr. Homfray had an interview with William Hayes, at Birmingham, and, in answer to Mr. Homfray, Hayes said, unless Mr. Pearson made up his mind soon, he should break off the negotiation, and he would give the plaintiffs the choice of it at 6000*l*. if Mr. Pearson declined to take it at that price. Shortly after, Messrs. Hayes & Wright (the defendants' solicitors), wrote as follows:—"We have now an offer made by Mr. Pearson's solicitor to purchase the Cuckold's Corner property (without Chapel House) for 5000*l*. We are now only waiting the decision of the *cestuis que trust* on the offer made." Mr. Homfray, on receiving this letter, went to Robert Smart, one of the parties beneficially interested, and claimed the right to purchase it at 6000*l*., and dissuaded him from retaining Chapel House, which would be injured by the colliery plant. Smart, and another of the parties beneficially interested, agreed that it would be a bad plan as proposed, but said that it must be offered to Pearson again for 5000*l*. Homfray objected, that this would not be fair to his

clients, and stated they would purchase the share of Chance and his wife. Homfray then had an interview with William Hayes, who said that it was not Pearson who had refused to give 6000*l.*, but the *cestuis que trust*, who wished to retain Chapel House.

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The bill alleged that the defendant Hayes observed, in reply to Mr. Homfray, "It's a good price, but in my opinion it is worth 100*l.* an acre for the buying;" by which, as the bill alleged, the said defendant asserted that the said estate was worth 1200*l.*, or thereabouts, more than the said sum of 6000*l.* The said Mr. Homfray then remarked that it was very extraordinary that the parties who were interested in the said property would not treat with the plaintiff, but would only treat with Pearson, observing that they would get a better price by taking advantage of the competition, and that the plaintiffs would give a higher price than Pearson, as they could work the mines without sinking on the surface. The defendant Hayes then observed, that they had determined to sell the property to Pearson, and referred to his own power, as trustee, as to which Mr. Homfray dissented, and informed the said defendant that he should buy Mr. and Mrs. Chance's shares.

On the next day, Homfray, on behalf of the plaintiff, bought Mr. and Mrs. Chance's share for 740*l.*, and on the same day sent to Hayes a notice of the purchase, which went on as follows:—

"And I further give you notice that my clients object to the sale of such their estate and interest in the said lands, mines, and premises by private contract, and that William Hollies has no authority from either the said Joseph Chance and Ann, his wife, or from my clients, to instruct you to act on their behalf about the sale of the one-eighth share. And I further give you notice and require you to communicate and consult me, as the solicitor of the said Messrs. Harper & Moore, as to any

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negotiations which embrace the entirety of the said lands, mines, and premises, and which may now be pending, and especially not to accept an offer which has been made to you by the solicitors of Mr. William Pearson, to buy the entirety of the cottages, lands, and mines, called Cuckold's Corner, for the sum of 5000*l.*, nor to offer to sell to the said William Pearson, or his solicitors, the entirety of the said messuages, lands, and mines, at the sum of 6000*l.* And I further give you notice, that my clients, the said Messrs. Harper & Moore, are prepared to give the sum of 5260*l.* for the other undivided shares of Mr. Jeston Homfray."

Subsequently, the share of Mr. and Mrs. Chance was duly assigned to John Harper, his heirs, executors, or administrators absolutely, with uses to bar dower. In this deed, Harper was a trustee for himself and his partner Moore.

Mr. Homfray subsequently addressed a letter to Hayes, stating that if he, as trustee, offered the property to Pearson, he should apply to the Court of Chancery for an injunction. The letter proceeded thus:—"You have hitherto acted only in your capacity of solicitor, and I need not remind you that some of the parties themselves have been negotiating for more than a year for the sale to Mr. Pearson, and that they have received the rents, and dealt with the property as owners, with your entire concurrence. From the notice which I sent you on the 16th of February last, you must see that my clients do not oppose a sale, but only a sale at an under-value and by private contract to a particular individual, to the exclusion of others who are willing to buy."

In reply to this letter, Messrs. Hayes & Wright informed Mr. Homfray that Mr. Hayes had agreed to sell the property to William Pearson for 6000*l.*

By an agreement in writing, dated the 24th of March, 1860, William Hayes agreed to sell the property to

William Pearson for 6000*l.* The sale to be completed on the 24th of June, 1860.

The bill charged that the defendant Hayes had entered into the agreement, without the authority and consent of the plaintiff, or of the other persons beneficially interested in the said estate, and contrary to their wishes. That the said Hayes had not attempted to realise the full value of the estate, by submitting the same to open competition. That, at the time when the said William Hayes entered into the contract with the said Pearson, he well knew that the estate was worth more than 6000*l.*, and that the plaintiffs had offered, and were in fact willing to give, 7000*l.* for the same. That, at the time when the contract was entered into, the defendant had only a dry legal estate vested in him, and that the defendant Hayes and his partner had been acting as solicitors for the parties, and had ceased to act as trustees, the *cestuis que trust* being really in possession of the estate.

The bill prayed that the trusts of the indenture of 1842, so far as they were unperformed, might be executed under the decree of the Court. The bill also asked that it might be declared that the contract of March, 1860, ought not to be carried into effect, and that the same might be delivered up to be cancelled, and that the defendant Hayes might be restrained by injunction from conveying or disposing of the said messuages, mines, or minerals.

Mr. Bacon, Q.C., and Mr. Renshaw, for the plaintiffs, submitted that the defendant Hayes had no right to enter into this improvident contract. He had by his conduct ceased to be a trustee, and the contract was, therefore, not binding; but even if Hayes were still a trustee when he entered into the contract, it was quite clear that the purchaser was aware of what was being done, and therefore the contract must be set aside against him also.

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Argument.

Mr. *Osborne Morgan*, for four of the *cestuis que trust*, stated that his clients thought themselves bound to complete the contract with Pearson.

Mr. *Malins*, Q.C., and Mr. *Fischer*, for the defendant Hayes, and the other parties interested.—The defendant Hayes entered into this contract with the concurrence of all the *cestuis que trust*. He had a very difficult duty to discharge; there was a flaw in the title, which would have been disclosed by a sale by public auction. The best course would have been to wait until effluxion of time had cured the defect; but this would not have been agreeable to the parties interested, who were in needy circumstances, and wanted the money. Under these circumstances, the trustee thought it his duty to effect an immediate sale by private contract. The plaintiff Harper never offered more than 6000*l.* until the offer had been made to Pearson, which the parties could not in fairness rescind. It was submitted, therefore, that the contract was binding, and the bill must be dismissed.

Mr. *Greene* and Mr. *Speed*, for the purchaser, submitted that he ought not to be prejudiced by the contest between the plaintiffs and the defendant Hayes. The purchaser had entered into the contract fairly, and paid the deposit, and this Court would not defeat his right to have the contract completed. That Hayes was still trustee, and had power to act, was clear: *Trower v. Knightley* (a).

Judgment.

THE VICE-CHANCELLOR:—

The case is one of considerable importance, as involving the question how far it is the duty of the trustee

(a) § Madd. 484.

for sale to obtain the best price possible for the trust property. Lord Eldon has frequently declared that it is the duty of the trustee, by every means in his power, to secure a proper competition for the property, in order to obtain the best price. Other judges have inculcated the same doctrine. Sir John Leach, in the case of *Ord v. Noel*(a), expressed himself thus: "Every trust deed for sale is upon the implied condition that the trustees will use all reasonable diligence to obtain the best price; and that in the execution of their trust they will pay equal and fair attention to the interests of all persons concerned. If trustees, or those who act by their authority, fail in reasonable diligence; if they contract under circumstances of haste and improvidence; if they make the sale with a view to advance the particular purposes of one party interested in the execution of the trust at the expense of another party, a Court of equity will not enforce the specific performance of the contract, however fair and justifiable the conduct of the purchaser may have been."

In that case the Court refused to enforce the contract because the trustee, influenced by the conduct of some of the parties, had adopted a disadvantageous mode of selling one lot without having taken steps, by a proper notice of the sale, to invite competition. It was the omission by the trustee to obtain competition, by proper notice of the sale, that formed the governing circumstance in that case, and induced the Court to refuse specific performance of the contract. In that case, moreover, the money to be obtained by the sale was divisible among creditors; and the defence made by the trustee for precipitating the sale was, that he sought to put the creditors in possession of their money as soon as possible. But, notwithstanding this circumstance, the Court refused to recognise a contract so entered into by the trustee.

(a) 5 Madd. 433.

1860.
HARPER
v.
HAYES.
Judgment.

1880.
HARPER
v.
HAYES.
Judgment.

In the present case, no attempt was made by the defendant Hayes to secure competition. It has been urged, in defence of his conduct, that there were difficulties in the title that induced him most prudently not to proceed with the sale without the concurrence of all the *cestuis que trust*. But these difficulties afford no sufficient reason why he should not endeavour in a careful and proper way to obtain offers from persons willing to purchase the estate. To some extent, the concurrence of the *cestuis que trust* is a justification of what otherwise would be wholly unjustifiable. It has been argued that the offer made, on the 1st of February, to the defendant Pearson, was accepted by him on the 17th, so as to constitute a valid agreement. If that offer, made with the concurrence of all the *cestuis que trust*, had been accepted by Pearson before any of the *cestuis que trust* had withdrawn their concurrence, a great deal might be said to show that the contract was binding. But even in that case, it was no more than an offer to agree on a price, subject to an arrangement as to the title. Therefore, if the case rested there, it would be difficult to say that the unqualified acceptance by Pearson of that offer constituted such a contract as this Court would enforce.

But the Court is relieved from this difficulty, because, before the offer was accepted, one of the parties interested in the property countermanded that offer, and warned the purchaser that he would not concur. It has been said that the plaintiff Harper was a mere purchaser of the share of one of the *cestuis que trust*, and that the purchase was merely colourable. But it has been clearly proved that the purchase was *bonâ fide*, and if so, it is impossible to dispute his right to countermand the offer made by the trustee. Indeed, the trustee Hayes himself admitted this right, for, after receiving the plaintiff's notice, he wrote to Pearson, informing him of what had taken place,

and stating that, after such notice, he did not feel justified in proceeding further under the contract. That was a just view of his position, and it is to be regretted that he did not continue to hold the same view, instead of seeking to act on his own authority as trustee in opposition to the wishes of some of the *cestuis que trust*. A trustee for sale ought not to disregard the wishes of the *cestui que trust*, except where the terms of the trust leave him no option.

But for the concurrence of the *cestuis que trust*, Hayes had no right to enter into the negotiation with Pearson at all without taking steps to procure a competition for the property. But with regard to the fact of the concurrence of the *cestuis que trust*, it must be remembered that they are persons in a very humble station of life, and that Mr. Hayes, besides being trustee, was also their professional adviser. He ought to have explained to them their position as to the property. There is no evidence to show that he gave to these poor people that explanation of their rights to which they were entitled.

It is said that Mr. Hayes had no personal interest in favouring Pearson. But it is perfectly clear that he knew that Harper was anxious to purchase, and he did not take advantage of that competition to secure the best price for the property.

It is not a right thing in a case of this kind that counsel should be instructed, on behalf of these poor people, to ask the Court to decide that they are each to receive 125*l.* less than another person was desirous to give them for the property. Professional men, when they are acting both as legal advisers and trustees, ought to be very sure of the grounds on which they are proceeding, and, if they are trustees for sale, ought to bear in mind the statement of their duty which was made in the case of *Ord v. Noel*.

1880.
 HARPER
 v.
 HAYES.
 —
Judgment.

1860.
HARPER
v.
HAYES.
—
Judgment.

There must be a declaration, that, having regard to the circumstances in the pleadings mentioned, the agreement of the 24th of March is not binding, and ought to be set aside. Order that the sum of 1500*l.* deposit be repaid to Pearson on or before the 1st of June next, and on such payment that the agreement be cancelled. Declare that the trust for sale be carried into execution under the direction of the Court; and, the plaintiff undertaking to give 7000*l.* for the property on the same terms, &c., contained in the contract of the 24th of March, and to pay 1500*l.* into Court, order, that the estate be offered for sale by public auction or private contract for the best price that can be offered; and no costs on either side. The defendant Hayes not to charge his costs against the trust estate.

BORTON v. DUNBAR.

1860.

May 31st.

CAPTAIN JOHN HENRY BORTON, of the 74th Highlanders, being on active service at the Cape, made his will, dated the 15th of August, 1852, as follows:—

“I, John Henry Borton, captain in H. M. 74th Highlanders, being of sound mind, do will and bequeath unto private Henry Thornhill, 74th regiment, who has been my faithful servant ever since I joined the corps, the sum of 10*l*. for his immediate use, my father having promised to provide for him. And to Sergeant James Dunn, of the 74th regiment, the sum of 10*l*. I further wish that my portmanteau, carpet-bag, and sea-chest be sent to my father’s residence and disposed of as he thinks proper. After these sums and other necessary expenses have been paid, as well as those sums mentioned in my letter dictated this day to Sergeant Dunn, I beg that the remainder of my money and effects may be expended in purchasing a suitable present for my godson, Henry Fitzgerald Dunbar, son of the paymaster of the 74th Highlanders.”

The letter referred to in the will was dictated by the testator after executing his will, and was addressed to his relatives. He referred to his illness and to the kindness of Dr. Peel, who had volunteered to attend him six or seven times a day. The letter went on to express his conviction that his father would see his wish carried into effect that a handsome present should be provided for Dr. Peel out of his effects: “With respect to pecuniary affairs and effects, in consequence of being ordered off to England by a medical board, I sold off everything with the exception of a few articles which, according to my father’s letters, I know he would like me to send

A testator, being an officer on service abroad, who was entitled to a remote reversionary interest in a large sum of stock, after giving two legacies of 10*l*. each and specific legacies of his carpet bag, portmanteau, and sea-chest, directed that the remainder of his money and effects might be expended in purchasing a suitable present for his godson (a child a year old).—*Held*, that the reversionary interest did not pass.

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home; and therefore I have left instructions that my portmanteau, carpet-bag, and sea-chest should be forwarded, in case of my death, to my father."

The testator died at Cape Town on the 16th of August, 1852. Letters of administration of his estate were granted to his father, the plaintiff, who was his sole next of kin.

It appeared, from the letter of Captain Dunbar, the paymaster of the 74th, and a statement of accounts, that after payment of the testator's debts and his two legacies of 10*l.* each, there remained in the hands of the paymaster 11*l.* 7*s.* 2*d.* which he retained, and which, it was said, was expended in erecting a tomb to the memory of the testator. The testator was entitled, under the will of his grandmother, Elizabeth Repton, to a vested interest in one-third part of the sum of 2397*l.* 3*s.* 6*d.* Three per Cent. Annuities, subject to the life-interest of Elizabeth Borton, testator's mother, therein. He was, at the time of his death, also entitled to a reversionary interest in one-third part of a sum of 11,344*l.* 9*s.* 9*d.* Bank Three per Cent. Annuities, subject to the life-interest of his father therein.

At the date of the testator's will, his godson, H. F. Dunbar, was an infant of about one year old, against whom this bill was filed for the purpose of having determined whether the reversionary interest, to which the testator was entitled at his death, passed under the residuary gift.

Elizabeth Borton, the testator's mother, died in January, 1859.

The question raised by the bill was, whether the reversionary property passed under the residuary gift. There was some conflict in the evidence as to whether the testator was aware that he was entitled to the reversionary property.

Argument.

Sir Fitzroy Kelly, Mr. Craig, and Mr. Borton, for the plaintiff.

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—
Argument.

The first objection to the claim by the defendant to be entitled under the will to the reversionary property is, that the gift is too vague. It was impossible to say what was the purpose of the testator, and what was to be expended; and the gift was, therefore, invalid: *Jerningham v. Herbert(a)*, *Corporation of Gloucester v. Osborn(b)*, *Cook v. Oakley(c)*.

Secondly, it was submitted that, giving full effect to the words of the will, they did not pass the reversionary property. The remainder of his money and effects could not be said to comprise a reversionary interest in that which might not fall into possession until after the death of the child. How could property not in possession be expended at all? and how could it be said that so large a sum could properly be expended in making a suitable present to a child one year old? It was quite clear the testator had in his mind only the small balance in the paymaster's hands, and not the property now in question, even if he were aware that he possessed it. *Cooke v. Oakley(d)*, applied to both parts of the case. All the authorities which could be cited in support of the claim, were simple cases of residuary gifts, without any special circumstance, as here.

Mr. Bacon, Q.C., and Mr. Leach, for H. F. Dunbar.

First, it appears from the evidence that Captain Borton well knew that he was entitled to the property in question; and if so, the Court would not presume in favour of an intestacy.

Then, were not the words sufficient? In *Legge v. Asgill(e)*, the words were nearly identical, but the Court held the gift passed. In *Kendall v. Kendall(f)*, the gift was a reversionary interest in stock.

(a) 4 Russ. 388.

(b) 1 Ho. Lds. Cas. 272.

(c) 1 P. Wms. 302.

(d) Ibid.

(e) T. & R. 265 (note).

(f) 4 Russ. 360.

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BORTON
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DUNBAR.

Argument.

Suppose the direction to expend the gift in a suitable present had been omitted, could it be doubted but that there was a good residuary gift? But if so, what difference could the direction make? All the Courts require is, that the gift should be distinct and clear, which it was in this case. The case of *The Corporation of Gloucester v. Osborn* was a gift to a corporation, and there was held to be uncertainty.

On the whole, it was submitted that the gift was valid.

[*Leighton v. Bailie* (a), *Stocks v. Barré* (b), *Boys v. Morgan* (c), *Rogers v. Thomas* (d), *Downs v. Gascoigne* (e), were cited. See also *Crook v. De Vandes* (f), *Peck v. Halsey* (g), (as to uncertainty) *Mason v. Robinson* (h).]

Judgment.

THE VICE-CHANCELLOR:—

In construing a will of this kind, the principle established by all the authorities is; that although the words "money and effects," or the word "money" alone; or "effects" alone; may mean the whole of the testator's property, yet those words will be controlled by the context of the will, if it shows that, in using the words, the testator did not intend to use them in the widest sense, as including the general residue of his estate.

This testator was an officer in the army; who died abroad. His will deals with very small matters, which were obviously those he desired to have effected immediately, and which were foremost in his mind. All that he speaks of in his will are two legacies of 10*l.* each; one to a private soldier, and the other to a serjeant. He directs his carpet-bag, portmanteau, and sea-chest to be

(a) 3 M. & K. 267.

(b) 1 Johns. 54.

(c) 3 M. & C. 661.

(d) 2 Keen, 8.

(e) Ibid. 14.

(f) 9 Ves. 197.

(g) 2 P. Wms. 387.

(h) 2 Sim. & St. 295.

sent to his father; and then comes the gift now in question.

The testator, having disposed of these very small matters, begs that "the remainder of his money and effects may be expended in purchasing a suitable present for his godson," now an infant. The principle of all the cases and authorities compels me to look at the context, and what I have now to decide is, whether, in speaking of the remainder of his money and effects to be expended in the purchase of a suitable present for his godson, the testator intended to have applied for the purpose of that present a remote reversionary interest in a sum of stock. That reversionary interest has not fallen into possession for a considerable number of years since his death. This is a case in which a specific purpose has been mentioned, and in which the object of that purpose is plain; and the only question is, what is the subject-matter, which, upon the true construction of the will, is applicable to the purpose so specifically mentioned? It is impossible to say that, for the purpose of making a suitable present to his godson, a remote interest in a sum of stock was likely or suitable at all. The purpose was immediate. There was nothing remote in it. The language of the testator is extremely plain. It is this, "that the remainder of my money and effects may be expended in purchasing a suitable present for my godson." How could a remote reversionary interest be expended in purchasing a suitable present for a boy? The contention is, that this remote interest might have been sold, and the produce applied in the purchase of a suitable present. But, in order to provide a suitable present for his godson, it cannot be supposed that a remote reversionary interest was in the testator's immediate contemplation. There is no direction for a conversion for sale; and, according to the language of the testator, it could hardly be intended that a large sum, consisting of a remote reversionary interest in stock, which might not fall

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BORTON
v.
DUNBAR.
Judgment.

1860.
BORTON
v.
DUNBAR.
—
Judgment.

into possession for a number of years—perhaps not until after the death of the godson—should be applied in purchasing a present for a child.

The case is one of great difficulty. But, looking at the purposes of the will, and considering that the subject of the testator's bounty was a suitable present for this child, the context of the will contradicts the notion that this remote reversionary interest should pass to the defendant. Upon the whole case, it seems to me that there should be a declaration that, according to the true construction of the will, the reversionary interest, to which the testator was entitled at the time of his death, did not pass by the gift in his will of "the remainder of his money and effects to provide for the purchase of a suitable present for his godson."

May 30th.

FOWLER v. ROBERTS.

A judgment creditor who had obtained judgment against the executor before decree—*Held*, entitled to enforce his judgment under 17 & 18 Vic. c. 125, s. 61, against a debtor to the estate, who in the statute is called the garnishee.

JOHN ROBERTS, the testator, died on the 19th of December, 1859, having appointed Sarah N. Roberts, the defendant, his executrix.

On the 24th of April, 1860, Edgar Burton, a creditor of the testator, obtained judgment by default against Mrs. Roberts, *de bonis testatoris si non de bonis propriis*, for 65*l.* 2*s.* 9*d.*

On the 26th of April, Edgar Burton obtained from the judge in chambers an order, under the 61st section of 17 & 18 Vic. c. 125, against William Parker, who was indebted to the estate in 25*l.* The order directed "that all debts arising or accruing from the said garnishee to

the said creditor be attached to answer what was due on the judgment." The order was served on the 26th.

On the 3rd of May, 1860, the plaintiff, who was a creditor of the testator in the sum of 29*l.* 19*s.* 3*d.*, obtained the usual administration decree for the administration of the testator's estate. Some time prior to the 8th of May, 1860, a copy of the decree was served upon the judgment creditor, with notice not to pay any money to the judgment creditors. Upon the 8th of May, Parker (the debtor) attended before the judge in chambers, to show cause against the order to pay his debt to the creditor under the 61st section. On it appearing that an administration decree had been made, the judge declined to make the order, but without prejudice to an application to the Court — Burton undertaking to admit the decree, and the debtor (Parker) undertaking not to pay away the money.

On the 18th of May, notice of the decree in the administration suit was served on the creditor's solicitor, together with notice of motion for an injunction; but it was also stated that, if the creditor would discontinue his proceedings under the Common Law Procedure Act, the plaintiff would not act on the motion.

Mr. *Martindale* for the motion, submitted that the proceeding was really a new action commenced against a debtor to the estate, which this Court would not permit: *Clarke v. Lord Ormond*(a). In this case, the executrix admitted assets, so that nothing further was required than to prove the debt.

Mr. *J. H. Palmer*.—By the 64th section the garnishee is entitled to dispute the debt, and if he did, there might be some ground for the objection raised, but here the

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—
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Argument.

(a) Jac. 108, 122.

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garnishee admits the debt, in which case, by the 63rd section, the Court is authorised to order execution to issue without writ or process of any kind.

[*Lee v. Park(a)*, *Vincent v. Godson(b)*, were cited.]

THE VICE-CHANCELLOR:—

By the settled rule of this Court a creditor, who has shown such diligence as to recover judgment at law

(a) 1 Keen, 714.

(b) 4 De G. M. & G. 547.

17 & 18 Vic. c. 125, § LXI.—
 “It shall be lawful for a judge, upon the *ex parte* application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his attorney, stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called garnishee) to the judgment debtor shall be attached to answer the judgment debt, and by the same or any subsequent order it may be ordered that the garnishee shall appear before the judge or a master of the court, as such judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.”

judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the judge may order execution to issue, and it may be sued forth accordingly without any previous writ or process to levy the amount due from such garnishee towards satisfaction of the judgment debt.”

§ LXIV.—“If the garnishee disputes his liability, the judge, instead of making an order that execution shall issue, may order that the judgment creditor shall be at liberty to proceed against the garnishee by writ, calling upon him to show cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment debtor, if less than the judgment debt, and for costs of suit, and the proceedings upon such suit shall be the same, as nearly as may be, as upon a writ of revivor issued under the Common Law Procedure Act, 1852.”

§ LXIII.—“If the garnishee does not forthwith pay into court the amount due from him to the

against the legal personal representative of his debtor before a decree for administration of his estate, will not be deprived by this Court of the fruit of his diligence. A judgment so obtained binds the assets in the hands of the legal personal representative. In this case the judgment creditor has obtained a judgment before the date of the decree, and is, therefore, entitled to have the benefit of what his diligence has enabled him to get. The creditor is seeking, by virtue of the recent Act, to enforce his claim against a debtor to the testator's estate, called in the Act a garnishee. The question is, whether this is such a proceeding after decree as the Court ought to restrain.

It is admitted that the judgment creditor is entitled to issue execution against the executor, but it is said he is not entitled to proceed against a third person indebted to the estate. But if the creditor is entitled to enforce his judgment against the executor, it is difficult to see on what principle he ought to be prevented from having the benefit of the collateral proceeding authorized by the Act for making that judgment available.

In this state of things, it rather seems to me that a judgment creditor, who has obtained judgment at law against the executor before the decree, is entitled to proceed under the 61st section of the late statute (17 & 18 Vic. c. 125). The motion must, therefore, be refused with costs.

1860.

FOWLER
 v.
ROBERTS.

Judgment.

1860.

June 12th.

GRIFFITHS *v.* COWPER.

Where a defendant, against whom a decree had been made, was permanently resident abroad, the Court ordered service of the decree on his solicitor in the cause to be deemed good service.

IN this case a decree had been obtained against the defendant, who is Her Majesty's consul at Pernambuco, for the specific performance of an agreement to allow the female plaintiff, Mrs. Griffiths, an annuity of 100*l.* per annum. The decree further directed the defendant, within two months after service of the decree, to pay to Mrs. Griffiths the arrears of the annuity, amounting to 450*l.*

The defendant was resident at Pernambuco, and had no residence within the jurisdiction. His solicitor was admitted to be in communication with him.

It was alleged there were no law-agents at Pernambuco, and that it took three weeks for a letter to arrive there from England.

Argument.

Mr. *E. R. Cook* now moved, on behalf of the plaintiffs, that service on the defendant's solicitor of the decree, dated the 6th of March, 1860, might be deemed good service, or that service of a copy of the decree on the defendant at Pernambuco might be deemed good service on the defendant.

Mr. *Mackeson*.—There is no reason given why the ordinary rule that the decree should be served personally on the defendant should be altered; on the contrary, this is a case to require personal service, as the service may be effected on the solicitor, and the time for complying with the order may have arrived before the defendant is even aware that such a decree has been pronounced. It was not pretended that the defendant was keeping out of the

way, or could not be found. The plaintiffs did not even attempt to show that they had endeavoured to find the defendant before coming to the Court.

[*Shegg v. Simpson* (a) was cited.]

1860.
GRIFFITHS
v.
COWPER.
—
Argument.

THE VICE-CHANCELLOR:—

The Court is bound to see that the decree is properly worked out, and, if there is an alternative, the plaintiff is bound to proceed in the way that is the most effectual and least expensive. In the present case, the least expensive way—and, having regard to the difficulty of effecting service in Pernambuco, the most effectual way—is to order service on the defendant's solicitor in England to be good service. *Judgment.*

The order, therefore, will be, that service on the solicitor of the defendant on the record on or before the 21st of June, 1860, may be deemed good service for the 30th of July next, and that the time for payment of the arrears be extended to two months from the 30th of July, 1860. Costs to be costs in the cause.

(a) 2 De G. & Sm. 454.

1860.

*March 10th,
19th, 18th,
14th, & 15th,
and May
26th.*

Bill by a tenant for life to set aside a settlement of the family estates, by which his estate tail had been converted into an estate for life, with remainder to his sons in tail male, and in default of such issue, with general power of appointment. It appearing that there had been sufficient explanation to enable any man of ordinary intelligence to understand the effect of the deeds, and the only evidence in favour of the plaintiff being his own denial on oath—the Court dismissed the bill with costs.

JENNER v. JENNER.

THIS bill was filed by Robert Francis Lascelles Jenner, late a captain in the army, praying that indentures, dated the 10th and 11th of June, 1850, whereby the family estates were resettled, might be set aside or rectified, as inconsistent with the arrangement entered into between the plaintiff and the defendant Robert Francis Jenner.

By indentures, dated the 8th and 9th of August, 1824, made in contemplation of the marriage of the plaintiff's father and mother, and a common recovery suffered in pursuance of an agreement for that purpose, certain estates in Glamorganshire and Yorkshire were settled on the defendant Robert Francis Jenner for life, remainder to his first and other sons successively in tail male. The settlement provided for a jointure of 1000*l.* in favour of the plaintiff's mother, with power reserved to Robert Francis Jenner to raise the said jointure to 1500*l.* a year, and of jointuring any future wife he might marry to the extent of 1500*l.* a year, and with power to raise portions for younger children to the extent of 2000*l.* The said Robert Francis Jenner had also power to charge the estates to any amount not exceeding 20,000*l.* for his own use.

The plaintiff was born on the 16th of September, 1826, and was tenant in tail of the estates; there were thirteen younger children living.

In 1850, Robert Francis Jenner was desirous of raising money on the estate (having exhausted his powers of so doing), and proposed to the plaintiff to open the entail and to let in a charge on the inheritance prior to his estate tail. The bill alleged that the plaintiff agreed to open the entail, and to charge the estate with a sum not

exceeding 15,000*l.*, and then to settle the estates exactly as they had been settled previously. The bill alleged that the arrangement further was, that Robert Francis Jenner was to give up his power of increasing his wife's jointure, and should out down his right to jointure a future wife to the amount of 700*l.* a year, and to surrender his power of raising portions for younger children of a second marriage.

The bill alleged that, at his father's suggestion, the plaintiff allowed him to direct Mr. Warter, his father's solicitor, to prepare the deeds, and then when such deeds were so prepared, they were executed by him and his father Robert Francis Jenner.

By the deed, dated the 10th of January, 1850, the estates were conveyed by the plaintiff and his father to a trustee and his heirs, free from the limitation in tail. By the deed, dated the 11th of January, 1850, the estates were reconveyed by the plaintiff and his father to trustees, and then became subject to certain charges, but freed and discharged from the powers limited to the said Robert Francis Jenner of further jointuring his present wife or future wife beyond 700*l.* a year, and of raising portions for the children of a second marriage, to the following uses:—To the defendant Robert Francis Jenner for life, remainder to the plaintiff for life, remainder to the joint and other sons of the plaintiff in tail male, and in default of such issue, remainder to such persons as the plaintiff should limit or appoint, and in default of such appointment, remainder to the daughters of the plaintiff in tail general, with cross remainders, and remainders over; remainder to the use of the plaintiff, his heirs and assigns. It was also provided that it should be lawful for the defendant Robert Francis Jenner, and the plaintiff, to raise on the security of the said estates any sum not exceeding 15,000*l.* for their own use and benefit, and for that purpose to revoke the said uses by any deed or deeds,

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—
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by them executed respectively. It was also provided that, in case the plaintiff should survive his father, he should have power to charge the estates with 15,000*l*. It was also provided that it should be lawful for the said Robert Francis Jenner to jointure any future wife to the extent of 700*l*.; a similar power was reserved to the plaintiff, and also a power to raise portions for younger children to the extent of 10,000*l*.

The bill alleged that the plaintiff never gave any instructions, verbal or in writing, to Mr. Warter, or to any person, to prepare the said deeds; that, prior to his executing such deeds, no explanation was given by the defendant Robert Francis Jenner, or by any other person, as to his position with regard to the said estates, the rental, or incumbrances thereon; that neither the said indenture nor any abstracts thereof were read by the plaintiff or by any person to him, except as to letting in the charge of 15,000*l*., and restricting the powers of the said Robert Francis Jenner to jointure and raise portions. The plaintiff further alleged that the effect of the said indentures was not explained to him by any person, and that he executed the same in the full belief that the family estates were resettled precisely as they had been settled by the indenture of August, 1824, except so far as they let in the charge of 15,000*l*. and modified and restricted the powers of jointuring and raising portions.

In September, 1850, the plaintiff's solicitor died.

Between January, 1850, and April, 1852, 10,500*l*. was raised in pursuance of the power reserved so to do. In January, 1854, the plaintiff's father asked him to join in raising the remaining 4500*l*., and on that occasion the plaintiff wrote to Mr. Warter on the subject, and received from that gentleman a statement of the charges on the estate, and the nature of the resettlement. The plaintiff deposed that he did not on that occasion understand that his position had been altered. Early in 1850, the plaintiff (as he alleged) for the first time disco-

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vered that it was reported commonly in the county that on his father's death he would be only tenant for life of the estates. A correspondence ensued, in the course of which an abstract of the limitations was sent to the plaintiff, who thereby ascertained that he was tenant for life, with remainder to his first and other sons in tail male.

On the 4th of July, 1858, the plaintiff wrote to his father as follows:—

“I have found out that the estate tail which I took under the settlement of 1824, was, in 1850, converted by you into an estate for life, with a limitation to my heirs male, and in default of my having any sons, a general disposing power over the estate. I need not tell you this has been done without my knowledge or consent, and in direct violation of our agreement, as the entail was opened by me in 1850, on the express understanding that the property was to be resettled in the same way as previously.”

In reply to this letter, Robert Francis Jenner wrote as follows:—

“You say in your letter that the estate tail which you took under the settlement of 1824 was, in 1850, converted by me into an estate for life, with a limitation to your sons male, and in default of your having sons, a general disposing power over the estate. I can only say it is the first I have heard of it, and that I always considered that the estate was resettled exactly the same as it was before it was opened, and Mr. Burn says the estates remain strictly entailed, as is the fact.”

The defendant Robert Francis subsequently wrote as follows:—

“I can only repeat what I told you last week, that I always understood that the entail was not altered in any way when it was opened in 1850, and I showed you a letter which I had received from Mr. Burn a few days ago. I have not got it here to refer to, but I think he said that he thought he had explained to your satisfaction that

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the entail remained the same. I trust it is so, and am not aware of any alteration myself."

The bill prayed that it might be declared that the indenture of the 11th of January, 1850, except so far as it restored the life estate of the defendant R. F. Jenner, and enabled such defendant and the plaintiff together to charge the estates with 15,000*L.*, and modified or restricted the power of jointuring and charging the estates with portions for younger children, was void and not binding on the plaintiff. And that the said indenture, save as aforesaid, and so far as the same was inconsistent, and not in accordance with the arrangement entered into between the plaintiff and the defendant Robert Francis Jenner, might be set aside or rectified, or varied, as the Court should think fit.

On the part of the said Robert Francis Jenner, evidence was adduced to show that the plaintiff was well aware of the effect of the deeds. The defendant Robert Francis Jenner deposed that he had shown to the plaintiff a letter dated the 2nd of December, 1849 (before the transaction impeached), from Mr. Warter, recommending him to make his son fully acquainted with what was intended to be done. It was proved by the evidence of Mr. Warter's conveyancing clerk that, on the 11th of December, 1849, on Mr. Robert Francis Jenner speaking to the plaintiff on the subject of what had been done with respect to keeping the estate in the family, it was arranged between them that the estate should be again resettled by the plaintiff as his father had done, *i. e.*, that the plaintiff should take a life estate as his father had done, after his father's death. Mr. Gove (the witness) deposed that he understood that that was the arrangement come to, in consideration of some advantages, and for the purpose of keeping the property in the family. The defendants further alleged that, at the suggestion of Mr. Warter, the plaintiff, and the defendant R. F. Jenner, agreed that the

estates should be resettled, by limiting to the plaintiff the estate which his father had taken under the settlement of August, 1824, with remainder to the plaintiff's sons in tail male. That the plaintiff and such defendant instructed the solicitor to prepare such deeds as he might think best calculated to give effect to the plan agreed on. The defendant also averred that Mr. Gove, prior to the execution of the deeds, carefully read over an epitome of the deeds to the plaintiff, and fully explained their nature and effect.

The plaintiff denied that he had seen the letter of the 2d of December, and alleged that the interview between the parties on the 11th December, 1849, only lasted half an hour, and was taken up with a conversation relating to the amount of money to be raised. He denied that any one had explained to him that his position or rights would be altered in respect of the said estates by reason of the settlement.

Mr. Rolt and Mr. Nalder.

There is clear evidence that the plaintiff was not aware of the effect of the deeds as to one part of the arrangement, and, if that is established, he is entitled to relief, even though the arrangement was for the benefit of the family. In *Gordon v. Gordon*(a), an agreement between two brothers for the division of the family estates was rescinded, after a lapse of nineteen years, on the evidence that one of the contracting parties was in possession of evidence which he did not communicate to the other. In *Torre v. Torre*(b), which, as to evidence, bore a strong resemblance to this case, an epitome of the deeds was sent to the plaintiff; but, nevertheless, the Court held, mainly on her own evidence, that there had been a mistake, which entitled her to relief.

(a) 3 Swanst. 400.

(b) 1 Sm. & G. 518.

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In *Hoghton v. Hoghton*(a), and *Baker v. Bradley*(b), in which a son, shortly after coming of age, was induced to enter into an arrangement affecting his rights, and of which the evidence showed he did not fully understand the effect, the Court so far set the deed aside.

It was submitted, therefore, that the plaintiff was entitled to have the deed rectified.

Mr. Craig and Mr. H. F. Bristowe.

It is well settled, as a general principle, that a Court will not vary any contract, except on the clearest evidence of mistake: *Henkle v. The Royal Exchange Assurance Company*(c); and even where an agreement is entered into on the supposition of a right in one, which may turn out to be vested in the other contracting party, it is, nevertheless, binding: *Stapilton v. Stapilton*(d).

An agreement between father and son for the settlement of the family property, if reasonable, is especially favoured in this Court, and will not be set aside on pretence that the settlement is executed by virtue of the father's authority.

[*Tendril v. Smith*(e), *Wycherley v. Wycherley*(f), *Shelburne v. Inchiquin*(g), and *Beaumont v. Bramley*(h), were also cited.]

Mr. Bacon and Mr. Rasch appeared for the younger children.

Mr. Rolt was heard in reply.

Mr. Malins and Mr. Osborne Morgan for the defendant Robert Francis Jenner.

(a) 15 Benv. 278.

(b) 7 De G. M. & G. 597.

(c) 1 Ves. sen. 318.

(d) 1 Atk. 10.

(e) 2 Atk. 80.

(f) 2 Ed. 175.

(g) 1 B. C. C. 338.

(h) 1 T. & R. 41.

The purpose of this suit is to enable the plaintiff to alien the family estate, and is therefore not such as this Court will favour. The plaintiff, subject to the life estate of his father, is absolute master of the estate, except as against his own children.

This was a family arrangement, and was reasonable and proper, and would not lightly be disturbed by this Court.

In *Cory v. Cory*(a), it was held, that an agreement, if reasonable and to settle family disputes, and no unfair advantage, is not to be set aside because one of the contracting parties was drunk, or paternal authority exercised. In *Bellamy v. Sabine*(b), an agreement between the father, tenant for life, and his eldest son, tenant in tail, for certain considerations to bar the entail and convey the estate to the son, was to that extent upheld, on the principle of family arrangements.

Supposing the plaintiff ignorant of the effect of the deeds, mere ignorance of rights is not sufficient to vitiate a family arrangement: *Stewart v. Stewart*(c).

In *Dimsdale v. Dimsdale*(d), where the father and son were indebted, and part of the estate was sold to pay certain debts and to release the son from difficulties, and the remainder resettled, giving the father no interest, and the son only a life estate, it was held that to this extent the arrangement, but for other circumstances, might have been supported as a family arrangement. In *Hartopp v. Hartopp*(e), where the facts were very similar to this, it was laid down, that transactions between parent and child are to be regarded with jealousy, but in arrangements between father and son for the resettlement of family estates, if the resettlement be not obtained by misrepresentation or suppression of the truth, if the

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(a) 1 Ves. sen. 19.

(c) 6 Cl. & F. 911.

(b) 2 Phill. 425.

(d) 3 Drew. 556.

(e) 21 Beav. 259.

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father acquires no personal benefit, and if the settlement is reasonable, the Court will support it, even though the father did exert parental authority and influence over the son to procure the execution of it.

On these grounds, it was submitted, the bill must be dismissed with costs.

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THE VICE-CHANCELLOR :—

In this case the plaintiff seeks to set aside, or rather seeks to rectify, a resettlement of family estates, so far as it gives him an estate for life instead of an estate tail. This resettlement was made about two years after the plaintiff had attained his full age of twenty-one. It was made on the occasion of his being asked by his father to join in disentailing the estates for the purpose of enabling the father to borrow a sum of 15,000*l*.

But the relief prayed by the bill is not sought on the ground that the father has obtained a benefit for himself at the expense of a son just come of age. So far as the settlement has charged the estate with money borrowed for the benefit of the father, the plaintiff does not seek to disturb it. If it were a case in which the interests of the son had been sacrificed or injured for the purpose of benefiting the father, without any corresponding benefit to the son, the Court would look with much jealousy at the transaction, and it would be difficult to support it.

But this case is of a different kind. What the plaintiff complains of is, that it was no part of the agreement, and understanding for the resettlement, that his estate tail should be cut down to an estate for life. If the plaintiff is entitled to the relief which he prays, it must be on the ground of mistake and misapprehension as to this one part of the transaction.

It appears that, about the end of the year 1849, the plaintiff's father, under the existing settlement, was tenant for life in possession, having a power to jointure and raise

portions for younger children, with remainder to his first and other sons in tail. The plaintiff, as his eldest son, was therefore, at that time, tenant in tail in remainder. He was then twenty-three years of age, and was a captain in the army serving with his regiment. His father was at that time in want of money, and on applying to the family solicitor, Mr. Warter, as to the best means of raising money, that gentleman, finding that the plaintiff was willing to assist his father to have the money charged upon the estate, advised that they should take that opportunity of making an arrangement to resettle the estates so as to preserve them in the family. By the letter of the 2nd of December, 1849, written by Mr. Warter to the father, an arrangement of this kind was for the first time suggested. In this letter it is said, with great propriety, "If anything of this sort appears to you desirable, it will be necessary to make your son fully acquainted with, and master of, the subject, and to be careful that nothing is done which in after-life may give him the idea that he has not been properly considered."

On the 8th of the same month the father writes to the solicitor, saying that he had given the letter of the 2nd of December to his son, the plaintiff, to read, and that they had some conversation on the subject of it. The plaintiff, however, denies that he saw the letter of the 2nd of December. By a letter of the 6th of December, the solicitor desired to have a personal interview with the father and son. Accordingly, on the 11th of December the plaintiff and his father went to the office of Mr. Warter, the solicitor, and had an interview with him which seems to have lasted more than an hour. During a great part of this interview, Mr. Gove, the conveyancing clerk of Mr. Warter, was present, and there seems no reason to doubt the truth or accuracy of his statement. He says: "The defendant Robert Francis Jenner, who is the plaintiff's father, was speaking to the plaintiff as to

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what he had done with respect to the resettling of the estate, keeping it in the family; the plaintiff acquiesced in that, and expressed his approbation of what his father had so done; and it was then arranged between them that the estate should be again resettled by the plaintiff in the same way as his father had done. I believe it was arranged that the plaintiff should take a life estate (as his father had done) after his father's death. I feel convinced that that was the arrangement come to, in consideration of some advantages, and for the purpose of keeping the property in the family. The plaintiff appeared to understand, and I believe did understand that."

Mr. Warter's statement, in the 19th paragraph of his answer, of what took place at that interview, quite accords with the evidence of this witness. It was agreed that the sum of 5000*l.* should be immediately raised, and Mr. Warter advised that the power of the plaintiff and his father to raise any further sums on the security of the estate should be restricted to 10,000*l.* Under the then existing settlement, the father had the power of increasing the jointure of his wife from 1000*l.* to 1500*l.* a year. But it was agreed that this power should be relinquished, and that the father's power to jointure any future wife should be reduced from 1500*l.* a year to 700*l.* a year. It was also agreed that the father should give up the power of charging portions for children of any future marriage.

Pursuant to this agreement, deeds were prepared in the following month. On the 11th of January, 1850, the plaintiff and his father attended at the solicitor's office. On that occasion Mr. Warter was not present, but his letter of the 10th of January to the father was produced at that meeting. In that letter Mr. Warter advised that the power of charging the estates during the joint lives should not exceed 10,000*l.*, and that the power of the plaintiff to charge after his father's death should be limited to that sum also.

It is clear, upon the evidence, that this letter and these sums were the subject of consideration and discussion at this meeting, and that both father and son agreed that the powers of charging should be restricted to the sum of 15,000*l*. For the purpose of explanation, an epitome of the limitations in the resettlement, giving the plaintiff an estate for life in remainder, was produced, and read at this meeting before the execution of the deeds. From the evidence of Mr. Gove it appears that everything was fully and deliberately considered on that occasion. There was sufficient explanation, and enough to enable any man of ordinary intelligence to understand perfectly the nature and effect of the deeds.

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The only important part of the transaction which the plaintiff insists he did not understand or agree to, and which he says was not explained to him, is the limitation of the life estate to himself. His own denial upon oath is the only evidence in favour of his case. Documentary evidence and the concurrent statement upon oath of three credible persons must outweigh that denial.

On questions of this kind, where deeds have been deliberately executed by one who afterwards seeks to set them aside on the ground of surprise or mistake, what the Court must look to is, whether there is evidence that there was sufficient knowledge of the nature, contents, and effect of the instrument conveyed to the mind of the person who seeks to be relieved. For the purpose of communicating this knowledge, it is generally enough to show that the instrument itself was read so as to be understood. The absurd and highly improper verbosity and prolixity of many modern deeds and wills make the mere reading or hearing them read, so as perfectly to understand their effect, a task not only irksome but very difficult, even to men who have much acuteness and facility of apprehension. In any case, therefore, but particularly in the case of a young man, who, soon after

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he comes of age, is about to execute deeds materially affecting his rights, it is the duty of professional men to be careful that everything of importance is fully explained, and a proper opportunity given to understand the nature and effect of the instrument.

It is proved by the evidence in this case that, both by word of mouth and by reading the contents of a short and clear epitome of the instrument, the plaintiff had brought to his mind a knowledge of the fact that under the resettlement he was to take only an estate for life.

Upon a careful re-perusal of the evidence, which shows the degree of explanation and information afforded to the plaintiff at the interviews of December and January, that evidence seems to me much more satisfactory than it did at the hearing. Perhaps the attention of the plaintiff was more engrossed by the question as to the amount to which the power of borrowing should be limited. If by any degree of carelessness on that point he omitted to fix his attention on the explanation, or on the words which limited the estate to himself, there seems to have been no indication at the time of any such inattention, or of any want of apprehension on that point. What the duty of the solicitor requires, and what the Court has to look to, is, that there was a sufficient degree of care in communicating to the plaintiff's mind the contents and effect of the deed, before he executed it.

The solemn and deliberate execution of a deed is not to be avoided on slight grounds, where the evidence shows that due care has been taken. It would be highly dangerous that a person who, before executing, has had properly and carefully communicated to him the real purport and effect of a deed which he deliberately executes, should be allowed to set aside and annul his own act and deed, merely on his own statement that he did not understand what was sufficiently explained.

But even if the evidence of his knowledge that his estate tail under the old settlement was to be cut down to a life estate were less clear than it is, there is another view of the case, on a fact admitted by the plaintiff, which would make it impossible to disturb this settlement. It is admitted by the plaintiff that a part of the arrangement which he understood and agreed to was to resettle the estates so as to restrict himself and his father from burdening them to a greater extent than that which is fixed by the deed. For the purpose of imposing this restriction, the alteration of his estate tail to an estate for life is only a proper part of the arrangement. Therefore, if the limitation of the life estate in the resettlement, which it is the object of this suit to annul, is involved in the restriction as to burdening the estate, which the plaintiff admits he agreed to, there can be no ground for the relief prayed by this bill.

As the case of the plaintiff, therefore, wholly fails, the bill must be dismissed with costs.

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*June 5th, 8th,
7th, 8th, &
July 25th.*

NOTTIDGE v. PRINCE.

Gift by a person of weak intellect of her whole fortune to a person who had acquired great influence over her mind, by making her and others believe that he sustained a supernatural character—*Held, invalid.*

No person who stands in a relation of special confidence to another, so as to acquire habitual influence over his mind, can accept any gift or benefit from the person who is under the dominion of that influence, unless a sufficient protection has been interposed against the exercise of such influence.

THIS bill was filed by Ralph Clarke Nottidge of Newton Stowmarket, in the county of Suffolk, as administrator of his sister Louisa Jane Nottidge, against Henry James Prince, the principal of the Agapemone, near Bridgewater, in order to obtain the transfer from the defendant to the plaintiff of two sums of Three per Cent. Consolidated Annuities, amounting together to the sum of 572*l.* 7*s.* 7*d.*, which had been transferred by the said Louisa Jane Nottidge to the defendant, and the dividends thereon since August, 1845.

In December, 1845, Louisa Jane Nottidge, whose fortune was now in question, was induced to leave her mother's house, and went to reside at Charlwich, in a cottage occupied by Prince's wife, and her mother having received information of where she was residing and with whom, requested her son, the brother of the lady, and her son-in-law, Mr. Ripley, to endeavour to rescue her daughter from the hands of the defendant and his associates. Mr. Nottidge and Mr. Ripley accordingly proceeded with a police-officer and carried off the lady, and removed her to Mr. Ripley's house in Woburn Place, where every effort was made to persuade her of the folly and impropriety of the course she had been pursuing, but in vain; she persisted in declaring that Prince was the Almighty in the form of a man, and had the power of conferring immortality, and that she could not leave him. At length, under medical advice, she was placed in an asylum kept by a Mr. Stillwell, at Hillington, Middlesex. In order to make her confinement there as little irksome as possible, the proprietor of the establishment, Mr. Stillwell, used to allow her to go about unattended, on a solemn promise

that she would not attempt clandestinely to escape from the establishment. Notwithstanding this engagement, in January, 1848, she disappeared for two days, and a watch having been placed at the station of the Great Western Railway, she was intercepted there in the company of Cobbe, a member of the Agapemone, and, after some resistance on his part, restored to the asylum. A series of applications to the Lunacy Commissioners was then commenced, and the matter was investigated, when the commissioners made the following report, Dr. Turner dissenting, and ordered her to be released from confinement, and placed the following reasons on the minutes:—

“Reasons—The board having received and read the two special reports made to them by the commissioners who visited Miss Nottidge, under the 76th section of the statute, and considering,

“First, that Miss Nottidge has now been confined as a lunatic patient at Moorcroft House for upwards of seventeen months.

“Secondly, that no material improvement has taken place in her mental condition, and that the extraordinary and irrational notions on the subject of religion, which the commissioners regard as delusions irreconcilable in her case with soundness of mind, remain unabated.

“Thirdly, that, excepting these delusions, Miss Nottidge has not exhibited, so far as Dr. Stillwell or the visiting commissioners can discover, any indications of mental insanity, and has not shown any incompetency to manage her property, or any tendency to maniacal excitement or violence, while her general behaviour, conversation, and manners have, in all other respects, been calm and rational.

“Fourthly, that the delusions of Miss Nottidge are not likely, in the judgment of the visiting commissioners, who are confirmed in their conclusion by the opinion of Dr. Stillwell, to be removed or diminished by further

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treatment in a lunatic asylum, and do not appear to be of such a nature as to render her dangerous to herself or others, or incapable of taking care of herself and her affairs.

“Lastly, that the bodily health of Miss Nottidge has been latterly giving way, and, as there is much reason to apprehend, might be seriously injured by the prolongation of her confinement.”

Immediately after her discharge on the 17th of May from confinement, she was met by Thomas, another member of the society, with whom she proceeded to Prince's broker in London, in order to transfer the stock into Prince's name. Being unable, however, to give the particulars of the stock which were required, the transfer was not made on that occasion, but on the 30th of June, she transferred the whole of the stock standing in her name, and which formed her whole fortune, into Prince's name.

Shortly after her release she brought two actions, one against her brother, Mr. E. P. Nottidge, for false imprisonment, and the other against Mr. Ripley, to recover the sum of 27*l.* which he had deducted, from monies belonging to her in his hands, for the expenses in the asylum; she recovered in the latter action the amount claimed and costs, and in the former a verdict for 50*l.* damages, chiefly as the plaintiff alleged, in consequence of Thomas preventing his wife, who was Miss Nottidge's sister, giving evidence, by addressing to her the following letter:—

“The Agapemone, Nov. 2, 1848.

“Agnes,—Whilst I thought you followed your unhappy course quietly, I did not feel disposed to interfere with you; but since it has come to my knowledge that you have spoken wickedly of God's holy truth, and declared gross and scandalous lies of those I most honour, love, and esteem, I am resolved to adopt a different

course towards you. How wretched is your condition! Given up to your own wicked heart, you love and make a lie, and drink in as sweet food for your malice the vilest and most disgusting scandal. Shame on you! it is out of the abundance of your own carnal heart that your mouth speaketh. Oh, Agnes! what have you lost! However, I write merely to inform you of my determination concerning you. God is, I know Him, deep, pure, holy, gentle love; I am His, and He is mine; you are mine, and I am resolved to use the authority God has given me to put a stop to your lying slanders; and for this purpose I can and will compel you to live where and how I please, and subject to my will and authority. Through God's pure love to me I have hitherto yielded to you the greatest indulgence, and you have abused the liberty and independence I trusted you with, as you have abused your other blessings. I have, therefore, felt the necessity of making you aware that I can and will direct your life, and this I will cause you to know by my actions, and not only by words. Should you write again, or speak so knowingly contrary to my wishes and to the truth, I will immediately remove your residence, and take the child under my own eye, and superintend the expenditure of the money for God's glory. I do not know that, under any circumstances, I shall look over your gross and selfish abuse of my forbearance towards you. Concerning the child, learn that I will do with it as God shall guide me—God who is love, holy, undefiled love, but who could wither the pride and independence of your heart in one moment. As to my immediate conduct towards you personally, it will depend on yourself, for be sure I will do what I may deem good after this warning without giving you any further notice. Blest beyond conception by the knowledge of God, in His pure, holy, and unchanging truth, I abide

“BROTHER THOMAS.”

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Miss L. J. Nottidge remained an inmate of the Agapemone until the 21st of August, 1858, when she died intestate.

For the purpose of proving that Miss L. J. Nottidge was under the spiritual dominion of the defendant, evidence was adduced to show that, on one occasion, Prince obtained 50*l.* from Miss Nottidge, simply by writing a letter in these words:—"The Lord hath need of 50*l.*, to be used for a special purpose unto his glory. The Spirit would have this made known unto you. Amen." Evidence was also given of the authority exercised by the defendant Prince over the members of the Agapemone, and of the habits of its inmates. The following is an epitome of the evidence:—

The defendant Prince was, in 1842, a clergyman of the Church of England, and curate to Mr. Starkey, who was the rector of Charlwich, near Bridgewater. Prince had been educated at Lampeter College, and had been regularly ordained; but, in consequence of certain irregularities of conduct the bishop of the diocese revoked his licence; and he then removed to Stoke, near Clare, Suffolk, which was in the vicinity of Mr. Nottidge's residence. Starkey also resigned his living and joined Prince at Stoke, and, his first wife being dead, Prince married a sister of Starkey. Prince subsequently removed to Brighton, where Mr. Nottidge, besides sons, had several daughters, of whom four, who were unmarried, attended the ministry of Prince and professed to be greatly blessed by it, and were so far under his influence that they followed him to Brighton. Their father died in May, 1844, and these ladies then returned to their mother at Rose Hill, and remained there for some time. They were entitled in their own right to fortunes of about 6000*l.* each, and from the time that this fact was known to Prince, the plaintiff's case was that Prince tried to get possession of their fortunes; in fact, succeeded, either by himself or by his followers, in getting possession of the whole fortunes of

four of these ladies. The leading principle inculcated, as the bill alleged, was thus described by Mrs. Thomas, in the fourth paragraph of her affidavit, "to disobey any direction of our parents, and to obey Prince."

In the summer of 1845 three of these ladies, Agnes, Clara, and Harriet Nottidge, left their mother's house, at Brighton, on Monday, to attend the opening of Prince's chapel at Charlwich, promising to return on the 14th of June, which was the following Saturday. They stayed at Taunton, and the sisters stopped at one hotel, and Prince, Price, and Starkey at another; but they all took their meals at the hotel where the Misses Nottidge were staying, and the ladies paid the bill. On the morning of the 10th of June, Prince and Starkey were sitting in the room of the hotel, when Starkey, speaking by the direction of Prince, informed Harriet Nottidge that she would give great glory to God by marrying Lewis Price, and after some exhortation they got her to consent to the marriage. Immediately on this consent being obtained, Price informed Agnes Nottidge that Prince wished to speak with her, and on her entering the room she found Prince and Starkey there, of whom the latter said to her, "God is about to confer a special blessing upon you; but you must promise to act according to the will of God." Agnes was unwilling to give any promise without being first informed of what was required of her, but at length consented, when she said she would marry Thomas. She then expressed a wish to have her property settled on herself and her children, when Prince said, "There is no need of that, you will have no family; it will be purely spiritual, to carry out the purposes of God." Miss Agnes Nottidge then withdrew. On the same day Prince dined with the ladies, in company with Price and Thomas, and during dinner informed the brides that it was the will of God their marriage should be solemnized at Swansea, and proposed they should all proceed thither at once for that purpose. The ladies objected, on the ground

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that it would cause great sorrow to their mother if they were to be married without first returning to see her.

Prince, however, told them that they must not allow any such feelings to divert them from the path marked out for them by God, and that if they read the Book of Jonah they would see the effect of acting contrary to God's commands. Two days after Harriet and Agnes had consented to marry Price and Thomas, Prince induced Clara to consent to marry William Cobbe, another disciple. On the 9th of July, 1845, the three sisters were married in the parish church of Swansea, attired in deep black.

Thomas had agreed to allow Agnes to have her property settled on her on the 21st of June, 1845, but before the marriage he wrote as follows:—

“ Windsor Terrace, Brighton, June 21, 1845.

“ My very dear Agnes,—It gave me pleasure by a letter from dear Brother Cobbe to learn that he had seen you off safely by the mail on Thursday morning. By this time you are either with the beloved Brother Williams, or else with the dear Sister Mabel. I know their love in Jesus, and that they will do everything to render your sojourn in Swansea good for you; but I know something more, I know the boundless love of Jesus; He will be with you, for His eye is on you, and whatever is good that He will bestow, whether it be joy or sorrow, ease or trial, comfort or difficulty; all things are yours, for you are Christ's, and Christ's is God's. Let not your heart be troubled under your present circumstances, neither let it be afraid at what friends or foes may suggest. Abide in the Spirit and will of God; then will your peace be like a river, wide and overflowing, and your soul will be sweetly borne along the stream of time until it reach the ocean of eternal love and rest. What I say unto you, I say also unto your sisters Harriet and Clara. Assure them of my love, and let them trust themselves

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to be carried by faith in the arms of Jesus whithersoever He will—not whithersoever they will—and they and you will find He will do you good at your latter end. My beloved Agnes, I must write to you just what the Spirit leads me to do. This I do with the more confidence, because I believe you have an ear to hear what the Lord may say unto you through him that loveth you. You mentioned your desire to have a settlement of your property upon yourself. This I assured you would be very agreeable to my feelings, and is so still; but last evening, waiting on God, this matter quite unexpectedly was brought before me. I had entirely put it away from my thoughts, leaving it to take its course as you might be led to act, but God will not have it so. He shows me that the principle is entirely contrary to God's word, and altogether at variance with that confidence which is to exist between us, who are one spirit. This desire on your part must be abandoned. Give it up to God, and show that you can trust His faithfulness, and I can assure you if you repose in Him you will not be disappointed. I know God, and I know that none who trust in Him shall ever, can ever be confounded. He that hath an ear to hear let him hear. As regards the promise you made your parents, I would merely say that any promise made when you were unconverted, and which was not in accordance with the Word of God, you are not bound to, neither would it be right in you to adhere to. I must bid you farewell, and believe me to abide, in much love,

“Yours affectionately in the everlasting covenant,

“BROTHER THOMAS.”

After his marriage with Agnes, Thomas, notwithstanding Prince had required him to attend him, went for a short time with his wife to her mother's house, at Llanidlo, in Wales; but Prince sent to Thomas the following message:—“Brother Thomas, I command you to arise and

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come to Weymouth. Amen!" His wife, however, dissuaded him from going, and having heard that Prince was in correspondence with her sister Louisa Jane, whose property was now the subject of the suit, to induce her to reside also at Weymouth, was in the act of writing a letter to Louisa to dissuade her from coming, when one of the brethren staying in the house looked over her shoulder, read what she had written, and, snatching it away, took it to Prince, and that evening, when she was proceeding to the bedroom usually occupied by her and her husband, the latter forbade her to enter, adding, "In writing that letter you have deeply sinned against God's Holy Spirit. I therefore care nothing about you, nor what becomes of you. The room adjoining this is empty; you can go there if you please, so that you be not near me;" and for some time Thomas left his wife to occupy a different room. A system of terrorism was used, and Agnes was told that if she dared resist Prince's authority, "God would crush her out of the way." In the latter part of the year 1845, Prince gave out that prayer, public or private, was unnecessary, for that the day of grace was closed, and the day of judgment had commenced. A part of the same imposture was that Prince's spirit was extinct, but his body was inhabited by the Holy Spirit. In February, 1846, Thomas left Weymouth, and followed Prince to Bridgewater, and on his admitting to Prince that his wife was in the family way, Prince immediately became very angry and insisted on Thomas leaving his wife, and in conformity with such command steps were taken to remove her, and she with her box were put outside the door with permission to go where she pleased except to her mother. In these circumstances she went to Thomas's mother in Carmarthenshire, where she was received with great kindness, and was there confined of a son. Thomas was informed that she was dangerously ill, and was also asked what should be the name of the child. He had made no

reply, and had never since returned to his wife. Prince asked her, "Can your heart submit to God's right to dispose of you and the child you have called yours?" To which she replied she could never acknowledge a man to be God, and would not give up the care of the child. On this Thomas wrote a letter, renouncing her for ever. Prince intimated that her pregnancy was the consequence of her disobedience, and that she must suffer for it, and told her she was most mercifully dealt with that she had not been "hurled into hell." Thomas wrote to her telling her that he would have nothing more to do with her, but that her fortune was at her disposal, and sent her a paper authorising her to receive the dividends; but on her having the authority put in a proper form and sent to him for execution, the letter and its contents were returned to her in pieces, and Thomas had ever since retained possession of her fortune and the dividends, except a few small sums, which he sent her occasionally.

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In February, 1846, in consequence of her pregnancy, Thomas, who was at the time staying with Prince, addressed to his wife the following letter:—

"My best beloved,—I herewith enclose you a small portion; eat, drink, yea drink abundantly; and let your soul delight in fatness; let the will of God be your home and resting place. Out of His will there can be no happiness: but in His will there is life, and joy, and peace. The servant of the Lord told me that you would not be in your present state unless you had rebelled months ago, and thus you will suffer for it in not being able to go about the same as you otherwise would; but when I see you I will tell you all about it."

In 1850, Thomas attempted to take possession of the child, but was prevented, and this attempt afterwards led to proceedings being instituted in this Court for the purpose

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of protecting the infant. Vice-Chancellor Knight Bruce, before whom the motion was made, granted an injunction, and appointed Mrs. Thomas and her mother guardians of the infant. See *Thomas v. Roberts* (a).

Evidence was adduced to show that the defendant and his disciples paid no observance to the Sabbath; that there was no prayer, and no private or public worship, except hymns of praise. Prayer was held to be useless, as the day of grace was considered closed, and the day of judgment had arrived.

The following extract from the answer of Prince was used as evidence of the religious opinions of the society to which he belonged:—

“ The object of all God’s dealings with man, even from the beginning, has been the development of His name to make Himself known. This is His glory. The way in which God in His wisdom, to make Himself gradually more and more known to man, as well as to develop His opening counsel and purpose concerning him, has been by raising up from time to time from among men certain individuals prepared and appointed by Him, and for the special end He has had in view. These have been His witnesses, inasmuch as they have borne witness or testified to the true character, the name of God, or to the particular mind or purpose of God, which they are appointed to develop. Moreover, they have been living witnesses, that is what they lived, not merely what they said, made manifest the character or mind of God. It is plain from the Scripture history of God’s dealings with mankind, that He has from time to time entered anew into covenant with man, and that on such occasions He has had one way of levelling, developing, and carrying on His counsel, and that that has been to select and appoint one man as His witness thereto. The first time God entered into

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covenant with man was at the creation of mankind. Then Adam was His witness. The second time when God is recorded to have entered into covenant with man was after the destruction of mankind by the Deluge. Then Noah was His witness. The third time when God is recorded to have entered into covenant with man was at the dispersion of mankind at the Tower of Babel, when He left them to their idolatry. Then Abraham was His witness. The fourth time was at the time of the redemption of mankind by the Gospel. Then Jesus Christ was His witness. God in Jesus Christ has again entered into covenant with man at the resurrection of mankind. This is the first resurrection, and now I am His witness. This one man, myself, has Jesus Christ selected and appointed His witness to His counsel and purpose to conclude the day of grace and to introduce the day of judgment, and to close the dispensation of the Spirit and the Gospel and to enter into covenant with flesh. The law closed as soon as one was found perfect therein, the Lord Jesus Christ; and in like manner the dispensation under which the spiritual seed of Jesus Christ lived, that is the Gospel, closed so soon as one was found perfect therein, Brother Prince. As it has been God's way in the history of mankind to issue a new dispensation by means of him as His witness, in whom He had made perfect the former one, so now He has introduced to-day a dispensation of judgment, and the first resurrection through Brother Prince as His witness, in whom He had by His Spirit fulfilled the dispensation of the Gospel and closed it."

The defendant, by his answer, denied that he was the founder, but alleged that Cobbe and Thomas were the founders of the institution called the Agapemone, and that its members profess to hold the doctrines of the Church of England, with other religious opinions.

He admitted that other persons besides Miss Nottidge

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had given him large sums of money. Starkey said he had given Prince 1000*l.*, and his wife had given him annually 80*l.* Mr. and Mrs. Price had given him 6000*l.*; Mr. and Mrs. Cobbe the same amount; and about 10,000*l.* had been given by Mr. Hotham Maber and his four sisters. With regard to the transfer by Miss Nottidge, he said that she had often offered to give him the above amount of stock before she was confined in the Agapemone, but that he would not accept it; that she made the transfer without his knowledge, and not at his request; and that she was not under any delusion with respect to him; the gift was entirely voluntary, as were all the other numerous gifts he had received. That Miss Nottidge did not pay for her board whilst residing in the asylum; that persons who lived in the Agapemone were not obliged to pay anything to him, it was entirely voluntary; and that there was no difference made in the treatment between those who did and those who did not pay; that he fed and clothed many poor in the neighbourhood of the asylum, and gave in charity sums from 1*l.* to 100*l.*; he claimed to be entitled to the amount of stock transferred to his name by Miss Nottidge for his own benefit.

He then went on to describe the Agapemone, which contained between fifty and sixty inhabitants.

The establishment consists of a large mansion-house, having attached thereto extensive gardens, conservatories, hothouses, pleasure grounds, and a farm of which the defendant is the proprietor in fee simple, consisting of about 200 acres of land, occupied by a person who cultivates and manages the same for the benefit of the members of the Agapemone. The produce of the gardens, hothouses, and farm are applied to the purposes of maintaining the table and other occasions of the members of the Agapemone, and the residents in the establishment enjoy every kind of comfort which such establishments can afford. In addition thereto, carriages

and horses are kept. There are numerous horses of great value, both for riding and driving, kept for the use of those resident at the Agapemone, and they occasionally drive out in a carriage drawn by four horses.

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Mr. *Malins*, and Mr. *Knox Wigram*, for the plaintiff.

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It was shown by the evidence that Miss Louisa Jane Nottidge was under the spiritual dominion of the defendant Prince, and, as the defendant himself admitted, believed his representations of his divine influence. It was quite clear that a person so weak as to be under the gross delusions which the defendant Prince inculcated with respect to his own mission, was not, at least in her dealings with Prince, competent to exercise a free choice. It was not necessary, moreover, to establish the jurisdiction of the Court, that there should be any fraud or any deception practised by the person possessing such spiritual dominion over the mind of the party requiring protection. It was enough to invalidate the gift, if undue exercise of spiritual dominion were proved.

In *Huguenin v. Baseley*(a), where a voluntary settlement was made by a widow upon a clergyman and his family, it was set aside as obtained by undue influence and abused confidence. In that case, Lord Eldon said(b), that he should regret that any doubt could be entertained about the power of this Court to take away from third persons the benefits which they had derived from the fraud, imposition, or undue influence of others.

In the case of *Norton v. Relly*(c), an annuity obtained from a woman, who was under a religious delusion, was set aside upon principles of public policy. In that case, Lord Northington, speaking of intriguing religious teachers, used the following language:—

“ And though, even against those unhappy and false

(a) 14 Ves. 273.

(b) Ibid. 289.

(c) 2 Ed. 286.

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pastors, I would not wish the spirit of persecution to go forth, yet are not these men to be discountenanced and discouraged whenever they properly come before the court of justice?—men, who go about in the Apostle's language and creep into people's dwellings, deluding weak women; men, who go about and diffuse their rants and warm enthusiastic notions, to the destruction, not only of the temporal concerns of many of the subjects of this realm, but to the endangering their eternal welfare. And shall it be said that this Court cannot relieve against the glaring impositions of these men? That it cannot relieve the weak and unwary, especially when the impositions are exercised on those of the weaker sex? It is by no means arguing agreeably to the practice and equity of this Court to insist upon it. This Court is the guardian and protector of the weak and helpless of every denomination, and the punisher of fraud and imposition in every degree. Yes, this Court can extend its hands of protection; it has a conscience to relieve, and the constitution itself would be in danger if it did not."

Every word of that judgment was applicable to this case. There was here the spiritual ascendancy which existed in that case and in *Huguenin v. Baseley*, and also the credulity of the dupe. Was it wonderful that, if this lady believed that the defendant possessed the power and influence he arrogated to himself, she gave him the whole of her fortune? The evidence clearly showed that Prince was the active agent in the imposture; but, even if, as he pretended, he had taken no part in the scheme by which Miss Nottidge transferred the stock into his name, and she was induced to do so by Thomas, by reason of the delusion she was under as to Prince's character and mission, the case of *Huguenin v. Baseley* clearly showed that the gift could not be supported. That Miss Nottidge was under the defendant's influence was proved beyond a doubt; for, even the Lunacy

Commissioners, though they discharged her from custody, distinctly stated that she was under delusion as regarded the defendant. Against influence of this kind it was the province of this Court to relieve. The authorities against permitting a transaction of bounty, in the language of Sir S. Romilly(*a*), to take effect between persons standing in certain relations, were very numerous. The relation of guardian and ward was not for this purpose confined to persons actually standing in that relation, but the rule included any person placing himself in a like situation. The relation between a minister and his congregation was in principle the same, and must be governed by the same rule. Applying this principle, then, to the present case, all the authorities demonstrated that a gift made during the continuance of such relation, could not stand in this Court. It was submitted, therefore, that the gift of the stock must fail.

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[*Bridgman v. Green(b)*, *Gibson v. Jeyes(c)*, *Dent v. Bennett(d)*, *Cooke v. Lamotte(e)*, *Hoghton v. Hoghton(f)*, *Billage v. Southee(g)*, were cited.]

Mr. Bacon and Mr. Smale, for the defendant.

The case was extremely simple in itself, but, for the purpose of enlisting the prejudices of the Court, a great variety of topics had been imported into it. Divested of all the irrelevant matter which had been dragged into the case, the fact was simply this, that this lady, who had been shut up for seventeen months in a lunatic asylum, from which she had been liberated by the Lunacy Commissioners in 1847, went to the place called the Agapemone, where there were her two married sisters, and where she lived to the day of her death. The practice of the

(a) 14 Ves. 279.

(b) 2 Ves. sen. 627.

(c) 6 Ves. 278.

(d) 7 Sim. 539; 4 M. & C. 269.

(e) 15 Beav. 234.

(f) Ibid. 278.

(g) 9 Hare, 534.

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institution was that the members should, if they pleased, contribute to the support of the institution, and it appeared that Miss Nottidge, like others, did so; but what was there to prevent her doing so? It was done with the full knowledge of her friends, and had remained unquestioned for ten years, and, but that she was now in her grave, the Court would never have heard anything of this case of alleged spiritual dominion. What the Court was asked to decide was, that this act was caused by improper influence, of which there was no proof whatever. And, in order to make out this charge, the only affidavits were those of Mrs. Thomas, who, rightly or wrongly, had quarrelled with her husband, and of a person who was himself foremost in doing the things which he now condemned, and now came to give evidence against his former client. There was one circumstance which could not have escaped the Court, that with every disposition to blacken the character of the defendant it had been found impossible to find a single case of immorality or misconduct. The defendant and those gentlemen who were associated with him were, and still are, clergymen of the Church of England.

The question was not whether Miss Nottidge was right in her religious views, but whether the defendant, by misrepresentation, had induced the deceased to surrender her property. In this country there was the most perfect toleration—Jew, Turk, infidel, heretic, were all entitled to the most perfect toleration; and to this most general rule there was but one exception, that those who did not believe in a future state of rewards and punishments were incapacitated from giving evidence. But there was no authority to show that if a gift was made to one who held erroneous views on religion that the error was a ground for setting the gift aside. Take the case of a gift by a Roman Catholic to the Pope. The Roman Catholic believed that the Pope possessed influence which far

transcended that claimed by the defendant: would it be pretended that such a gift could be impeached on the ground of undue influence? The cases which had been cited fell far short of what was necessary to be established here. In *Norton v. Relly*(a), indeed, the law was carried higher than in the other authorities, and than the opinion of Lord Eldon, but that case was of little authority.

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THE VICE-CHANCELLOR.—The case is of unquestionable authority, and spoken of with approval by the present Lord Chancellor. It was cited by Sir S. Romilly in his celebrated argument in the case of *Huguenin v. Baseley*. At that time it had only been published in the "Collectanea Juridica," but it was afterwards published in Mr. Eden's Reports.

Mr. Bacon.—The language of the judgment is violent, and not in accordance with that calm and dispassionate tone that ought to characterise a judicial decision, and it went far beyond the temperate language of *Huguenin v. Baseley*, and the other cases. Those cases were all cases where there had been undue influence. Here, not only was the case first raised after a considerable lapse of time, and after the death of the alleged dupe, but the case of undue influence was wholly disproved. The only case which had been adduced to show that the defendant ever solicited money was the case of the 50*l.*, which had been applied in enabling a Jew to escape persecution and embrace Christianity. This was asked from her for the service of God, exactly on the same principle as that on which collections were made at every charity sermon. In order to succeed, the plaintiff must show clearly and distinctly a case of misrepresentation and deception. The plaintiff well knew that no such case could be made out, and therefore it was that every attempt was made to

(a) 2 Eden, 286.

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throw ridicule on the society to which the defendant belonged, and the unusual course was adopted of setting out *in extenso* the judgment of the Vice-Chancellor Knight Bruce in the case of *Thomas v. Roberts*. The defendants denied on oath that the description of them and their pursuits contained in the judgment of the Vice-Chancellor was true; but even if it were, it did not support the case made by the bill. The frame of the bill was to obtain a re-transfer of a sum of 5700*l.* stock, and one difficulty was, that there was no such sum in the defendant's possession; but the defendant preferred to have the case dealt with on the substance. According to every rule of pleading, the Court must reject all the evidence that was not referable to the allegations in the bill, and, applying that rule, the bulk of the plaintiff's evidence was inadmissible: *Gresley on Evidence* (a), *Gordon v. Gordon* (b), *Langley v. Fisher* (c), *Austin v. Chambers* (d). What had Mr. Thomas's conduct to his wife to do with the defendant's alleged influence over the mind of Miss Nottidge? There was no suggestion that the defendant was an immoral teacher, and no trace of anything of the kind in the evidence. Mere peculiarity in his religious views would not invalidate a gift, though no doubt most men would think them erroneous. He did not deny the wisdom and goodness of God or the authority of the Scriptures. But, even if he were proved to be an irreligious man, he was not to be deprived of his legal rights. The motive which mainly influenced Miss Nottidge was to be near her married sisters, though doubtless she also desired to have the benefit of the defendant's ministry. If the degree of influence which existed here was sufficient to annul a gift *inter vivos*, there was no knowing to what it would extend. This would have vitiated the gift of Sir W. Pynsent,

(a) Page 232.

(b) 3 Swanst. 472.

(c) 9 Beav. 90, 101.

(d) 6 Cl. & F. 1, 38.

who disinherited his relatives, and devised the bulk of his estate to the first Earl of Chatham, from admiration of his public character. The cases fell far short of what was necessary to support the plaintiff's case here. The only case that seemed at all like it was a recent case of *Kirwan v. Cullen*(a), where the case of spiritual influence was considered and decided, and the weight of the authority of the case was against the case set up here. Whatever might be the error of the defendant's views, they could not justly be described as wanting in reverence to religion. Speaking as a lawyer, he was bound to say that nothing had been proved to disentitle the defendant to the enjoyment of his civil rights, and to that measure of justice which he asked at the hands of the Court.

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[*Cooth v. Jackson*(b), *Evans v. Bicknell*(c), *Benbow v. Townsend*(d), *Hunter v. Atkins*(e), *Lomax v. Ripley*(f), *Walgrave v. Tebbs*(g), *Tee v. Ferris*(h), *Carter v. Green*(i), *Pratt v. Barker*(k), *Boyce v. Rossborough*(l), were cited.]

Mr. *Malins*, in reply.

The amount of money obtained under the system pursued by the defendant and his disciples showed the spiritual ascendancy exerted over the persons subject to their influence. The proceedings of Thomas and the others formed a part of the *res gestæ*, and were therefore strictly evidence in this cause.

It was not denied that the defendant laid claim to the character of a person divinely inspired, and that Miss Nottidge believed "all he declared about himself;" but, if so, it could not be contended, that a gift made by a

(a) 4 Ir. Chan. Rep. 322.
(b) 6 Ves. 12.
(c) Ibid. 183.
(d) 1 M. & K. 506.
(e) 3 M. & K. 113.
(f) 3 Sm. & Giff. 48.

(g) 2 K. & J. 313.
(h) Ibid. 357.
(i) 3 K. & J. 591.
(k) 1 Sim. 1.
(l) 6 H. L. Cas. 2.

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person labouring under such delusion in favour of the object of her credulous belief, could be supported in this Court. This case went far beyond the cases of *Huguenin v. Baseley* and *Norton v. Relly*, because here the delusion was far greater, and more calculated to paralyse the free will of the person who was subject to it. If, for example, it were true that the Holy Spirit dwelt in the body of Prince, and spoke by him, how could a demand for money be refused? If, indeed, it had been desired that Miss Nottidge should exercise her free will, why was not a disinterested adviser called in, who could protect her against the spiritual ascendancy which the defendant had over her; but no, this was not the object in view. A number of authorities had been referred to, but very few of them applied to the case. The case mainly relied on by the defendant was *Kirwan v. Cullen*(a), but that was a case of a gift by a Roman Catholic lady to the titular archbishop, but she had never known him personally or been under his influence, and that distinguished the case from the present. Here it was clear that the delusion under which Miss Nottidge laboured was fostered by the defendant himself, and he could not be allowed to avail himself of his own wrong. The case was far within the principle laid down by Lord Northington, in *Norton v. Relly*.

Judgment.
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THE VICE-CHANCELLOR:—

In the month of June, 1848, the defendant, Henry James Prince, obtained from Miss Louisa Nottidge the transfer into his own name of two sums, making together the sum of 5728*l.* 7*s.* 7*d.* Three per Cent. Bank Annuities.

This stock was the whole of her remaining fortune, and her whole means of subsistence.

The defendant claims to be entitled to retain it for his own use as a free gift made to him by this lady. She

(a) 4 Ir. Chan. Rep. 322.

died intestate in the year 1858. Her brother, who is the plaintiff, has instituted this suit as her legal personal representative to recover the property as her personal estate.

The bill avers that the alleged gift to the defendant was obtained by misrepresentation and deception, and was made under the influence of a gross delusion inculcated and encouraged by himself for his own purposes, when she was incompetent to manage her own pecuniary affairs, or effectually to apply her mind to business of any description. If these allegations are sufficiently proved, the defendant cannot be allowed to retain the property. Where a gift is made under the influence of delusion or deception, it cannot be valid. Whether the delusion or deception relate to matters spiritual or matters temporal is immaterial, for if the gift be made under the influence of the delusion, the right of restoration is clear.

There is ample evidence that the defendant exercised a powerful and undue dominion over the mind of Miss Nottidge and his other followers by assuming a false character. The character which he assumed and which he induced this lady to believe that he really sustained, he has himself described in his cross-examination in the following terms :—

“ God has developed through me His counsel and purpose, which I have made known to others.

“ I have declared that the Holy Ghost by me did close the day of Grace, and introduce the Judgment. I have declared and mean that the Holy Ghost spake by me.”

To rational minds it may seem surprising that any human being could be found with an understanding so weak and degraded as to submit to the influence and guidance of a person who thus speaks of himself. But it appears that the lady in question, Miss Louisa Nottidge, and her four sisters, the daughters of a respectable country gentleman of considerable fortune, submitted themselves entirely to his dictation. He says :—

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“The Nottidges called to see me after they had heard of my ministry.

“Three of the Miss Nottidges married. They all married after I became acquainted with them. They all married persons who were associated with me, and whose opinions were the same as mine. I suppose I must say they married through my instrumentality, inasmuch as they married through my telling them that it was the will of God that they should so marry. Their husbands procured their money with their consent, and they gave it to me. I think they gave me between 5000*l.* and 6000*l.* each, or thereabouts.”

These passages from the defendant's own depositions are only a very small part of the evidence which shows beyond all doubt, that, by falsely and blasphemously pretending that he had a direct divine mission, he imposed on these weak women and obtained a gift of the whole of their fortunes.

As to the gift of 5728*l.* by Miss Louisa Nottidge, which it is the object of this suit to set aside, the case is very clear. This unfortunate lady escaped the degradation of such a marriage as had been made the means of conveying all the money of her sisters into the pocket of the defendant. Her complying disposition to part with her money under the influence of the defendant and at his bidding, without recourse to marriage, is shown by the fact that he at once obtained from her 50*l.* merely by writing and sending to her a letter in these words:—

“The Lord hath need of 50*l.* to be used for a special purpose unto His glory. The Spirit would have this made known to you. Amen.”

His own deposition as to the gift to him of the 5728*l.* stock is in these terms:—

“Louisa, at the end of 1845 or beginning of 1846, requested me more than once to accept the money. She believed that I had special revelations upon particular

subjects. She gave me all her money after she had come out of the lunatic asylum."

These statements, from the defendant's own mouth, prove the case of a gift obtained by imposing a belief upon the mind of a weak woman that he sustained a supernatural character. This successful imposture was the influencing motive for the gift, and therefore vitiates it entirely. It is needless to inquire or speculate whether the defendant was himself also the victim of his own imposture. The most favourable view of his conduct would be that, under the influence of a disordered imagination, he really fancied himself to be such a supernatural being as he made these ladies to believe. Even if it were possible to take this lenient view of the defendant's conduct, where the question is as to the validity of the gift, it is only necessary to show that it was bestowed under the influence of a delusion.

A great deal of the arguments of counsel on both sides consisted in discussing the doctrine of the Court as to the validity of gifts obtained under the influence of a religious or spiritual ascendancy. The grossness of the imposture in the present case has put it far beyond mere spiritual influence. But this gift must have been set aside as obtained under the influence of spiritual dominion, even if the false character assumed by the defendant had not been a part of the case.

No person who stands in a relation of spiritual confidence to another so as to acquire a habitual influence over his mind, can accept any gift or benefit from the person who is under the dominion of that influence, without the danger of having the gift set aside. If it can be shown that a sufficient protection has been interposed against the exercise of the influence, there may be a case to sustain the gift. But the principle prevails where there exists a relation which naturally creates influence over the mind. Therefore the doctrine extends

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to the relation of attorney and client, of guardian and ward, of parent and child. But there does not arise from any of these relations an influence so strong as that of a minister of religion over a person under his direct spiritual charge. Fortunately, the exalted character of Christian ministers in this country makes the occurrence of such questions extremely rare. When Lord Northington in the case of *Norton v. Relly(a)* set aside a gift made by a lady to a dissenting minister, he noticed that such questions seldom occur. But the principle is clearly established in this Court. The strength of religious influence is far beyond that of gratitude to a guardian, trustee, or attorney, and the same ground of public utility which requires this Court to guard against such influences, has its most important application to that influence which is the strongest. In Roman Catholic countries, where spiritual influence has its highest dominion, public policy has required the interposition of an absolute and imperative check. The law of France, as stated by M. Pothier, absolutely prohibits not only all gifts by a penitent to his confessor, but all gifts to that religious community of which the confessor is a member. In the present case the grossness of the imposture and the weakness of the person who was imposed upon, make the right of the plaintiff very clear.

It is impossible to overlook one of the results of the decree which must be made in favour of the plaintiff. He sues as legal personal representative, and when the money is restored, it will be distributable among the next of kin. Two of the next of kin are still under the dominion of the defendant's influence and victims of his imposture. Another is Mrs. Thomas, the wife of one of the defendant's associates, whose marriage was effected under the defendant's influence. The disgraceful conduct

pursued towards her is detailed in the evidence. It is needless now to consider what her rights are as one of the next of kin. When the money is restored to the plaintiff as legal personal representative, there will be sufficient means of asserting the rights of all the next of kin.

In the mean time the duty of the Court is to declare that the transfer into the name of the defendant of the several sums of stock mentioned in the bill was improperly obtained, and must be set aside. The stock must be transferred to the plaintiff as legal personal representative of Miss Louisa Nottidge, and all the dividends which have accrued due on it since her death, paid to the plaintiff. The defendant must pay to the plaintiff all the costs of this suit.

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June 11th.

DAWSON v. NEWSOME.

An agreement to compromise a suit, containing a stipulation that it may be made a rule of Court, may now be enforced on petition supported by affidavit, where the whole matter is before the Court.

Forsyth v. Manton (a) considered.

THIS was a petition, praying that an agreement dated the 20th of April, 1860, might be carried into effect under the direction of the Court, and that the respondent might pay to the petitioner on a day to be fixed by the Court the sum of 621*l.* 5*s.* 4½*d.*, or such sum as, on taking the account on the footing of the agreement, might be found due to the petitioner, with the costs of the petition.

On the 20th of April, 1860, the following agreement was entered into between the parties, for the compromise of the suit of *Dawson v. Newsome* :—

“ In Chancery. *Dawson v. Newsome*. Terms this day agreed on between the above plaintiff and defendant for a settlement of the suit.

“ 1. The bill to be dismissed by consent after the following terms have been carried out.

“ 2. The defendant to pay to the plaintiff or his solicitors the sum of 50*l.* as agreed costs of suit, to be taken as the solicitor and client's costs of the suit.

“ 3. The 300*l.* paid by the defendant to Messrs. Flux & Argles (plaintiff's solicitors) to be applied first in payment of the above costs, and the balance then to be paid to the plaintiff on account, and given credit for as on the day of the receipt by Flux & Argles.

“ 4. Both parties to be credited in account with interest at 5 per cent. per annum from the date of their several advances being applied in payment of liabilities.

“ 5. The plaintiff to be entitled to credit for all payments made on account of extra works, and for all costs and payments on joint account, or in acquiring or obtain-

ing possession, or in obtaining the lease, and otherwise in relation to the property and works.

" 6. The attested copy of the lease, and the duplicate of the deed of severance indorsed thereon, as prepared by Messrs. Flux & Argles, to be completed at the joint expense.

" 7. An account (exclusive of rents, which the parties intend to deal with separately), upon the above footing, to be prepared by Messrs. Flux & Argles, and sent to Mr. Newsome within a week.

" 8. The balance due from Mr. Newsome on the above account, to be paid to Mr. Dawson on or before the 10th of May next.

" 9. In case of default in such payment, plaintiff to be at liberty to make this agreement a rule of Court or order in the cause. Dated this 20th day of April, 1860."

The petition stated that, in pursuance of the agreement, an account was prepared, and submitted to the defendant, with a computation of interest, making a total of 682*l.* 6*s.* 4*d.* On the 7th of May, 1860, the defendant's solicitor called at the office of the petitioner's solicitor, and inspected the vouchers, but made no objection further than requiring the banker's pass-book to be produced. The petitioner's solicitor thereon attended at the office of the respondent's solicitor with the pass-book.

The affidavits, on both sides, disclosed a long discussion as to one or two alleged errors and overcharges.

On the 8th of June, Mr. Tibbitts, the respondent's solicitor, tendered to Mr. Flux, the solicitor of the petitioner, the sum of 635*l.* 10*s.* 6*d.*, to which the latter replied by handing to Mr. Tibbitts the following writing: "I do not decline to receive the 635*l.* 10*s.* 6*d.*, which you tendered to me as Mr. Dawson's solicitor, if tendered conditionally, and without prejudice to Mr. Dawson's rights."

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The petition was subsequently presented, after which the respondent tendered the amount in dispute, with interest and 10*l.* for costs, which was, however, declined.

Mr. *W. D. Lewis*, and Mr. *J. N. Higgins*, for the petitioner, submitted that the petition was the proper mode of enforcing the agreement. The terms were precise and definite, and the only parties that could be affected were the petitioner and the respondent. Formerly, no doubt, a petition to enforce a compromise could not be sustained, on the ground that an adjudication was in fact a hearing of the cause, which could not be heard upon affidavit. In *Askew v. Millington (a)*, Turner, V.C., considered a proceeding by petition objectionable, as "adjudicating on affidavit upon matters depending on equities wholly distinct from the equity appearing upon the record in the cause." But here the equity involved in the compromise is solely the account, which also alone constituted the equity of the suit—a different and more summary mode of adjusting the account being the only object which the agreement of compromise had in view. Moreover, the decision of a cause at the hearing on affidavit was now a matter of daily practice, and it was submitted that the only objection to proceeding by petition was removed.

Mr. *Malins*, and Mr. *Hamilton Humphreys*, for the respondent, contended, first, that the petitioner's case failed on the merits, and was too vague to be enforced, *Price v. Griffith (b)*; and, secondly, that this Court had no jurisdiction to enforce an agreement for the compromise of a suit upon petition, *Richardson v. Eyton (c)*. In *Forsyth v. Manton (d)*, Sir John Leach distinctly laid it down, that this Court has no jurisdiction on motion to en-

(a) 9 Hare, 65.

(b) 1 De G. M. & G. 80.

(c) 2 De G. M. & G. 79.

(d) 5 Madd. 78.

force an agreement being no part of the suit, but something privately come to, and not made an order of the Court. There could be no distinction between an attempt to enforce an agreement by motion or by petition; both were irregular, as seeking to accomplish by an interlocutory proceeding what could only be done regularly at the hearing of the cause. It was submitted, therefore, the petition must be dismissed with costs,

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THE VICE-CHANCELLOR:—

The merits of the case are wholly with the plaintiff, but it is contended that the Court has no jurisdiction to make the order prayed for on petition.

Judgment.
 —

In the case of *Forsyth v. Manton (a)*, Sir John Leach refused, on motion, to direct the performance of an agreement which had been entered into between the parties. But he did so on the ground that the agreement embraced collateral matters which were not put in issue in the cause, for it referred to an action at law on a patent, and to other matters, as to which this Court had no jurisdiction, unless the parties had stipulated to make the agreement a rule of Court. There was there no such stipulation. Sir John Leach said *(b)* “ This Court has no jurisdiction to enforce an agreement which is no part of the suit, but has been privately come to by parties out of court, and has not been made a rule of Court.” This case was under the old practice.

In the case of *Askew v. Millington (c)* the Vice-Chancellor Turner, in an elaborate judgment, points out the inconvenience likely to arise from deciding on petition, with evidence merely on affidavit, questions that would more properly come on for decision at the hearing of the cause, upon evidence taken as depositions on examination.

But under its improved practice, this Court has now to decide, upon evidence by affidavit, questions that could

(a) 5 Madd, 78.

(b) Page 90.

(c) 9 Hare, 65.

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formerly be dealt with only at the hearing, on the depositions of witnesses examined on interrogatories. On motion for a decree, the cause is disposed of on evidence by affidavit, which formerly could only be used on interlocutory applications.

At the same time, it is impossible as a general rule, to say that agreements of this kind ought to be enforced by petition. There may be an agreement for compromise entered into most fairly for adjusting the rights of the parties to it, which may involve the rights of third parties, and may require things to be done which the Court ought not to enforce in an interlocutory proceeding. But where no such circumstances exist, and the whole matter is before the Court, the difficulty is less.

This is a case in which the rights of no third parties are involved. The acts agreed to be done are simple; and if I were to refuse to entertain this question on petition, the petitioner would simply convert all the allegations in the petition into allegations in the form of a bill; he would give notice of motion for a decree supported by the very same affidavits resworn, and would, on the very same allegations, and on the very same affidavits, be entitled to the order he now asks. Everything necessary to entitle the petitioner to the order he asks is now before the Court, and the order, therefore, will be as follows:—

“That, it appearing by the agreement stated in the fourth paragraph of the petition, that it was thereby agreed that the same should be made an order of this Court, this Court doth order that the same agreement be made an order of this Court accordingly, to be observed and performed by both parties according to the tenor and the meaning thereof. And it is ordered that the defendant William Newsome do, on or before the 29th day of June, 1860, pay to the plaintiff Benjamin Newsome the sum of 621*l.* 5*s.* mentioned in the 13th clause of the said petition, together with interest thereon from the 10th of May, 1860,

the amount of interest to be verified by affidavit; such payment to be made without prejudice to the right of the defendant to have the bill of costs referred to and taxed. And it is ordered that the defendant William Newsome do pay to the plaintiff Benjamin Dawson his costs of this application and consequent thereon, to be taxed by the Taxing Master. Liberty to apply."—Reg. Lib. 1154.

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 Judgment.

CONWAY v. VERNON.

June 9th.

WILLIAM VERNON, of Wright's Road, Old Ford, Bow, the testator in the cause, by his will, dated the 12th of August, 1859, after desiring that his debts, funeral and testamentary expenses should be paid by his executor, gave, devised, and bequeathed unto his son, the defendant William Vernon, *inter alia*, all his household furniture, linen, wearing apparel, horses, carts, and all and every sum and sums of money which might be in his house or about his person, or which might be due to him at the time of his decease, and also all monies invested in the stocks, funds, and securities for money, book debts, bills, notes, or other securities; and also the freehold houses and property situate in St. Jude Street, in the parish of St. Matthew, Bethnal Green, in the county of Middlesex; also, unto the defendant William Vernon, he gave, devised, and bequeathed, the freehold house and property situate in Wright's Road; and he also requested and desired that his leasehold property, situate Nos. 18, 19, & 20, Cross Street, Hoxton, in the parish of St. Leonard, Shoreditch, and Nos. 22 & 23, Windsor Street, Hoxton, in the same parish, and Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, & 11, Digby Walk, in the parish of St. Matthew, Bethnal

On a gift by a testator of all his freehold House and property, situate in Wright's Road, the Court held that scaffolding and building materials situate on the ground near the House, did not pass.

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Green—all in the county of Middlesex—should be sold, and that the produce of such sale should be equally divided between the defendants Charlotte Vernon—the testator's wife—Frederick Vernon, and Henry Vernon; and he nominated the plaintiff his executor.

The testator, William Vernon, died shortly after the date of his will, which was proved by the plaintiff. The property in Digby Walk comprised in the will, and, also, certain leasehold houses at Hollybush Gardens, Bethnal Green, as to which the testator died intestate, were in a very dilapidated condition; and the suit was instituted partly for the purpose of ascertaining what fund ought to be applied in repairing them. The defendant, William Vernon, who was an infant at the time of filing the bill, laid claim to some building materials and scaffolding which were, at the time of the testator's decease, upon the piece of ground at Wright's Road, contending that they passed under the words "freehold house and property situate in Wright's Road."

Argument.

Mr. *Malins* and Mr. *Cutler* appeared for the plaintiff.

Mr. *Bilton*, Mr. *Pater*, and Mr. *Pace* appeared for the several defendants.

Judgment.

THE VICE-CHANCELLOR said that the words "freehold house and property situate in Wright's Road," were expressive of property permanently situated there, and did not refer to chattels or effects which might happen to be accidentally and temporarily on the ground near the house.

The following order was made:—

"Declare that the building materials at Wright's Road form part of the general personal estate of the testator, and let the defendant William Vernon be charged with

the value of such part as he has appropriated to his own use.

“Inquire whether any and what proceedings should be taken as to the property mentioned in paragraphs 4, 5, and 6 of the bill (the leaseholds, as well those comprised in the will as those unbequeathed), and how any monies to be expended thereon should be raised, and liberty for any of the parties to lay proposals before the judge in chambers for raising the same.”

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COULSON v. ALLISON.

March 10th &
21st, June
12th & 21st.

ON the 1st of July, 1853, the plaintiff Ann Welbank married the defendant John Nicholson, who was the husband of her deceased sister.

By an indenture bearing date the 31st of May, 1853, the equity of redemption in certain farm-buildings, an orchard, lands and hereditaments at Alne, in the county of York, which had been devised by the will of Michael Coulson, deceased, and were then and since in the occupation of Robert Coulson, were, for the consideration therein mentioned, conveyed to Ann Welbank, widow (daughter of the said Michael Coulson), her heirs and assigns for ever, subject to a mortgage for a term of 1000 years to the defendant John P. Allison, his executors, administrators and assigns, to secure 600*l.* and interest at 4 per cent.

By an indenture dated the 28th of October, 1853, purporting to be a post-nuptial settlement, and expressed to be made between the said John Nicholson and Ann his wife

A settlement of real and personal property belonging to the plaintiff, executed in consideration of her marriage with the husband of her deceased sister, set aside, on the ground of failure of the consideration.

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of the one part, and Jonathan Nicholson (a relative of the said John Nicholson) of the other part, the said John Nicholson and Ann Welbank (therein described as Ann the wife of the said John Nicholson) conveyed and assigned the premises contained in the above indenture of the 31st of May, 1853, and also a bond-debt of 900*l.* then due to the said Ann Welbank from a Mr. Henry Peckett, to the said John Nicholson, his heirs, executors, administrators and assigns (as to the said hereditaments subject to the said mortgage), in trust for the said John Nicholson, his heirs, executors, administrators and assigns, as his own property, monies and estate, free from any claim or right into or out of the same by or on the part of the said Ann his wife. The deed was executed by Ann Welbank, and acknowledged by her as a married woman.

On the 17th of January, 1854, the defendant Nicholson obtained payment of the bond debt of 900*l.* from the obligee H. Peckett.

In December, 1859, the plaintiff Ann Welbank separated from the defendant, and had from that time lived apart. By an indenture dated the 12th of January, 1860, in consideration of 1100*l.* Ann Welbank assigned and conveyed the lands and hereditaments comprised in the deed of the 31st of May, 1853, to her brother Jonathan Coulson the plaintiff, subject to the mortgage.

J. Coulson, by the same deed, covenanted with Ann Welbank to pay off the mortgage for 600*l.* to the parties entitled to receive the said mortgage monies. It was sworn to in the evidence that the sale to Coulson was *bonâ fide*, but it was admitted the purchase-money had not been paid.

In the latter part of January, 1860, the plaintiff Coulson applied to the mortgagee Allison to be allowed to pay off the mortgage immediately, including interest for the six months in advance, instead of notice. On the 3rd of February, Messrs. Arrowsmith and Allison addressed

to Coulson a letter containing the following passage :—

“With reference to your proposal to pay off the mortgage for 600*l.*, held on property at Alne by Mr. Allison, we beg to say he has no objection to receiving his money from any party entitled to redeem him, with the usual six months’ notice as offered by you. Inasmuch, however, as the equity of redemption is claimed adversely by Mr. Nicholson, our client, and also (we believe) by Mr. Coulson, we could not hand over or convey the legal estate, except under the direction of both these parties. Mr. Allison has no wish to be made a party to a Chancery suit, or to be otherwise involved in litigation, and we would, therefore, suggest your putting yourself in communication with our agents, Messrs. Clark & Morice, 29, Coleman Street, London, by whose advice he will be guided.”

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On the 30th of January, the defendant Nicholson advertised the lands and premises for sale, upon which Coulson gave notice that he should take immediate steps to stop the sale, which the defendant thereupon abandoned.

Subsequently to the letter of the 3rd of February, the London agents of the mortgagee applied to Coulson for leave to inspect the deed of the 12th of January, 1860, and shortly after such inspection, wrote to the plaintiff’s solicitor as follows :—

“Mr. Nicholson, having made to Mr. Allison a similar offer to yours, it occurs to me that he is entitled to the preference, and we shall, therefore, in all probability, advise the arrangement with Mr. N. to be carried out. It does not occur to us that your client will thereby be prejudiced in trying any question as to the *bona fides* of his recent conveyance.”

On the 6th of March, 1860, the plaintiff Coulson filed his bill against the mortgagee Allison and the defendant Nicholson, alleging that Nicholson had im-

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properly let the said premises, and intended to sell the same, and also that Allison had threatened to convey the premises to the said Nicholson. The bill also prayed for the usual accounts against Allison, and for a reconveyance on payment of what should be found due. As against Nicholson, the bill prayed that the post-nuptial settlement might be set aside, and asked for an injunction against all the defendants.

The defendant John Nicholson, in his answer, said that, prior to his marriage with Ann Welbank, it was agreed between him and the said Ann Welbank, that she should convey and assign to him absolutely all her real and personal estate, in consideration of his paying her debts and supporting and maintaining her as his wife; that he had accordingly paid her debts to the amount of 300*l.*, and supported her as his wife up to December last, and that he was ready and willing to support and maintain her in that character. He also pleaded the Statute of Limitations in respect of the claim made upon him for the money received by him on the bond.

On the cause coming on on the 1st of May, 1860, leave was given to amend the bill, by making Ann Welbank a co-plaintiff. The bill was accordingly amended, and prayed that the defendant Nicholson might be ordered to pay to the plaintiff Ann Welbank the sum of 900*l.*, being the amount of the bond debt, after deducting the amount paid by Nicholson for the debts and liabilities of Ann Welbank prior to her marriage with him.

Ann Welbank, by her evidence on the motion for the decree, deposed that, in August, 1859, she first became aware that the marriage was invalid between herself and the defendant Nicholson; but that for some time previously she had some suspicion that something was wrong, as Mr. Peckett, who paid her the annuity to which she was entitled under the will of her deceased husband, made her sign a receipt by her name of Ann Welbank.

Ultimately, as she alleged, having ascertained that her marriage with the defendant was illegal, she became convinced that he went through the ceremony of marriage for the sole purpose of obtaining her fortune, and left his house in December, 1859.

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Messrs. Arrowsmith & Allison deposed, that shortly before the marriage, or alleged marriage, they received instructions from John Nicholson, who stated that he was giving such instructions with the assent of Ann Welbank, to prepare the deed of gift which it was now sought to set aside. They deposed that they were not informed that the said John Nicholson had then undertaken to pay Ann Welbank's debts; but they understood that she and the said John Nicholson were much attached to each other, and intended to live together, although the law would not allow their marriage to be valid. They further deposed, as the said Ann Welbank had no children, they did not see any reason why she should not make such a gift to the said John Nicholson, as she was then, as they believed, of the age of fifty-six years, or thereabouts, and knew perfectly well what she was doing. The draft of the deed having been prepared, and John Nicholson having requested the matter to be proceeded with, they, for their own satisfaction, asked for a personal interview with the said Ann Welbank. On the 27th of October they waited on her with the draft of the deed, and had a personal interview with her in the absence of John Nicholson. They then examined her, and read over and explained the draft, and informed her that her marriage was in all probability void. They stated their belief that Ann Welbank fully and clearly understood the nature of the deed, and the doubt that existed as to the validity of her marriage; but they stated that she nevertheless stated to them that it was in accordance with her wishes, that she understood the nature of the deed, and requested that it might be carried into effect, notwithstanding the invalidity of her marriage. At their request,

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she wrote and gave them a letter in the following terms:—

“ Thirsk, 27th October, 1853.

“ Gentlemen,—Having had the draft conveyance of a freehold estate in the township of Alne, in the county of York, belonging to me, and assignment of a bond from Henry Peckett, Esq., to me, for securing 900*l.* and interest, in trust for Mr. John Nicholson, of Thirsk, in the said county, auctioneer, read over to and fully explained to me by you in a personal interview and in the absence of Mr. John Nicholson, I beg to state my approval of the contents of such draft, and request that the matter to which it relates may be completed forthwith; and I have to state that it is my intention for Mr. John Nicholson to have and be possessed of the said freehold estate, bond-debt, and interest described and set forth in the said draft, as his own absolute property, although the marriage which has been solemnized between him and me is void or voidable.

“ I am, gentlemen, yours truly,

“ ANN NICHOLSON.

“ Messrs. Arrowsmith & Allison,

“ Solicitors, Thirsk.”

They alleged that, in consequence of the above letter, they caused the deed in question to be engrossed, and after its execution it was acknowledged by Ann Welbank as a married woman.

Argument.

Mr. *Malins* and Mr. *R. W. E. Forster*, for the Plaintiffs.

There were two objections to the deed of the 23rd of October, 1853: first, that it was executed by reason of the undue influence exercised over the plaintiff Ann Welbank by the defendant John Nicholson; and secondly, that the whole consideration for it had failed. As to the first point, it was clear that a voluntary gift by one person

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to another who exercised great influence over the donor, could not be supported in this Court, at least, if the gift was made during the existence of such influence: *Page v. Horne(a)*, *Cooke v. Lamotte(b)*, *Hoghton v. Hoghton(c)*. On the second point, it was clear the plaintiff Ann Welbank was induced to execute the deed in the belief that she had received the status of marriage, and that the defendant was bound to maintain her, in both of which respects the consideration failed; and the deed, therefore, ought to be set aside.

Mr. *Greene* and Mr. *Marett*, for the defendant John Nicholson.

The plaintiffs, Ann Welbank and Jonathan Coulson, were improperly joined in this suit. The female plaintiff having, as she alleged, sold the real estate, had no interest in that part of the bill which sought to set aside the deed as to the real estate; the relief she asked was as to the 900*l*. On the other hand, the sole relief sought by Coulson was to the real estate. It was submitted, therefore, that the suit was improperly constituted.

Secondly, it was submitted that the Statute of Limitations was a bar to the claim of Mrs. Welbank to recover the monies received by the defendant; and lastly, that the plaintiff Ann Welbank could not be permitted to revoke the deed, which she deliberately executed with the full knowledge that the marriage was illegal by the law of England.

It was further submitted that, as the case made at the bar was not that alleged by the bill, the plaintiffs, if they succeeded, were not entitled to costs.

Mr. *Bacon* appeared for defendant Allison, but took no part in the argument.

Mr. *Malins* was not heard in reply.

THE VICE-CHANCELLOR:—

The objection of misjoinder cannot be sustained.

(a) 11 Beav. 227.

(b) 15 Beav. 234.

(c) Ibid. 278.

Judgment.
—

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v.
ALLISON.
—
Judgment.

The plaintiff Coulson is suing to obtain the real estate which he has agreed to purchase from Mrs. Welbank, but as she is bound to make a good title, and the real estate and the bond debt were assigned by one and the same instrument to the defendant John Nicholson, the plaintiffs are not improperly associated together in this suit.

The objection on the Statute of Limitations must also fail. There could be no adverse possession until the parties separated, which was in December, 1859.

The main question is as to the validity of the deed of the 28th of October, 1853. That was a deed executed by the plaintiff Ann Welbank, in contemplation of obtaining the advantages arising from the relation of husband and wife. But from the state of the law it is quite clear that the consideration failed. It is a well-established principle of this Court that a grant made in consideration of an expected benefit fails with the failure of the consideration, and the property must be restored on equitable terms. There must, therefore, be a declaration, that the conveyance, grant, and assignment of the real estate and of the bond for 900*l.* must be set aside, and the defendant John Nicholson must pay the costs of the suit. With regard to the ordinary costs of the mortgagee, the plaintiff must pay them as a matter of course, and also the mortgagee's costs of the suit, which has arisen in a great measure from the imprudence of Mrs. Welbank in contracting such a marriage. The plaintiff Coulson cannot be in a better position than Mrs. Welbank, from whom he has purchased the equity of redemption. The plaintiff must, therefore, pay the whole of the mortgagee's costs.

On the 21st of June the following decree was made:—
“Declare that the deed of the 28th of October, 1853, is to be set aside, and order that the same be delivered up to the plaintiff to be cancelled. Tax the plaintiffs their costs of this suit up to the hearing, and let such costs, when taxed, be paid by the defendant John Nicholson.

Refer it to chambers to take an account of all sums of money received by the said John Nicholson in respect of the rents and profits of the real estate at Alne in the said indenture of the 28th of October, 1853, mentioned, and for principal and interest in respect of the bond-debt of 900*l.* in the said indenture also mentioned, and a like account of all payments properly made by the said John Nicholson for repairs and permanent improvements on the said real estate, and in respect of any of the debts and liabilities of the plaintiff Ann Welbank, including the said mortgage debt and interest, to the said John Pick Allison, or any part thereof respectively; and inquire what is proper to be allowed to the said John Nicholson in respect of any claim for clothing, maintenance, and medical attendance for the said Ann Welbank during the time she resided with the said John Nicholson."

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Judgment.

CHESSHYRE *v.* BISS.

June 1st.

THIS bill was filed by Charles J. Chesshyre, for an account of what was due to the plaintiff for principal, interest, and costs, on the security of an equitable mortgage of a certain close of land called Brooks Mead, in the parish of Berkley, in the county of Gloucester.

A husband having by purchase with his own money obtained a conveyance to himself of freehold lands to which his wife had an incomplete equitable title, deposited the title-deeds to secure a loan to himself, and died having, by his

The bill stated that, on the 18th of October, 1858, the plaintiff lent to Charles Biss, deceased, the sum of 180*l.* upon having deposited the title-deeds of the property in question, and a promissory note for the amount, together with an acknowledgment in writing that he had that day

will, given all his real and personal estate to his wife, who, after his death, purchased a judgment debt against her husband's estate, prior in date to the deposit by way of mortgage. On a bill by the mortgagee—*Held*, that his title was paramount to that of the wife, both in her own right and as judgment creditor.

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deposited the said deeds mentioned in the schedule thereto by way of securing the same. And he thereby agreed with the said C. J. Chesshyre that, in case default should be made in payment of the said principal monies and interest therein, he, the said Charles Biss, would, at any time thereafter, at the request of the said C. J. Chesshyre, but at the costs and charges of the said Charles Biss, execute a legal mortgage of the said hereditaments and premises for the purpose of securing the said principal monies and interest thereon.

On the 3rd of December, 1858, Charles Biss died, insolvent, having by his will devised all his real and personal estate to his widow, the defendant Elizabeth Biss, her heirs and assigns, and whom he also appointed his executrix.

The bill was filed shortly afterwards. The defendant Elizabeth Biss, in answer to the plaintiff's claim, alleged that in the year 1805 one Charles Neale contracted to sell the property in question to Antony Wiltshire, her uncle, but that after the contract it was ascertained that the vendor was only tenant for life with remainder to his second son, who was under twenty-one, and that in consequence of that discovery it was arranged that the purchase-money should be paid to the vendor, and that his son George should, when he attained twenty-one, and without any further payment, join in the conveyance. Antony Wiltshire also took from the vendor a bond, in order to secure the due completion of the contract. This bond, which was dated the 1st of January, 1806, recited the contract dated the 21st of August, 1805, whereby Charles Neale agreed to sell Brooks Mead to Antony Wiltshire, his heirs and assigns, for the sum of 380*l.*, and that Antony Wiltshire had paid the sum of 30*l.* in pursuance of such contract, but that, on investigating the title to the said lands, it had been ascertained that the said Charles Neale was only entitled to the said lands for his life,

with remainder to his second and other sons in tail male. It was further recited that the said Charles Neale had nevertheless requested the said Antony Wiltshire to pay the residue of the said purchase-monies amounting to 350*l.*, he, the said Charles Neale, undertaking that his second son and all other necessary and proper parties would, within three calendar months next after his said son should attain the age of twenty-one years, execute a good and sufficient conveyance in fee of the said piece of land and the appurtenances thereof to and to the use of the said Antony Wiltshire, his heirs and assigns. The said bond contained a condition that, if the said Charles Neale and his second son and all necessary and proper parties should and did within three calendar months next after such second son should attain twenty-one, execute a good and sufficient conveyance unto and to the use of the said Antony Wiltshire, his heirs and assigns, the said bond, &c., should be void.

Antony Wiltshire died in January, 1819, having by his will devised all his residuary real estate to the defendant in fee, and appointed her his executrix. The defendant alleged that immediately on Antony Wiltshire's death she entered into possession of the rents and profits of the Brooks Mead estate under the will, and had ever since been in possession.

She alleged that in 1820, when she married C. Biss, a settlement was executed on her marriage, which did not, however, include this property. She alleged that Charles Biss, her husband, under the belief that he was entitled to the Brooks Mead estate, obtained from Charles Neale, the vendor, and George Neale, the tenant in tail, to whom he paid 60*l.*, a conveyance of the Brooks Mead estate, bearing date the 29th and 30th of January, 1836, which was enrolled as a disentailing deed, and was executed in consideration of 60*l.* paid by Charles Biss to George

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Neale. Subsequently to the decease of her husband, Mrs. Biss took an assignment of a judgment debt for 1825*l.* 17*s.* 4*d.* which was registered by John Rogers against her deceased husband, which was prior in date to the plaintiff's mortgage.

The defendant Mrs. Biss deposed that she never knew of the conveyance of the land to her husband until the filing of the bill. She deposed further that her husband always treated the land as being her property under the will of her uncle Antony Wiltshire.

Argument.

Mr. Bacon, Q.C., and Mr. Freeman, for the plaintiffs, contended that Biss was a purchaser for value from the tenant in tail, to whom he paid 60*l.* for the estate in remainder.

It was submitted that the bond was derived from a person who had no right to the inheritance, and that it passed to Biss in right of his wife.

With regard to the judgment debt, it was contended that, as the defendant, when she took the assignment of the judgment debt, was entitled to the equity of redemption, she could not set up her prior incumbrance against a subsequent mortgage of which she had notice: *Toulmin v. Steere* (a), *Otter v. Lord Vaux* (b).

Mr. Malins, Q.C., and Mr. Haddan, for the defendant, contended, first, that Charles Biss was a trustee of the land for his wife, and that when under his will the legal estate therein became united in her with the equitable interest, she was entitled absolutely to the land, freed and discharged from the equitable mortgage of the plaintiff, or at all events charged with no more than the 60*l.* paid by Charles Biss.

With regard to the bond, it was submitted that Charles

(a) 3 Mer. 210.

(b) 2 Kay & J. 650.

Biss could only have received the money in his marital character.

With respect to the judgment debt, that had been assigned to the defendant only in her character of executrix, and not as owner of the equity of redemption. It could not, therefore, be postponed to an incumbrance later in date.

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The defendant's case wholly fails.

Whatever might have been the defendant's right before her husband purchased the inheritance from the tenant in tail, it is quite clear that so soon as he clothed himself with the legal estate, he was in a condition to confer a good title on any person who had no notice of his wife's equitable interest.

As regards the judgment, assuming that the assignment was *bonâ fide*, it is clear from the authorities that where a mortgagor takes an assignment of a prior incumbrance, he cannot set it up against his own mortgagee.

There must, therefore, be the usual foreclosure decree.

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The purchaser of a leasehold having paid part of the price without calling for the title-deeds, was held fastened with notice of a mortgage by deposit, which was concealed by the vendor, but not with notice of an equitable mortgage, which the vendor had fraudulently effected on the security of a spurious lease of the same property; and the purchaser having obtained an assignment of the valid mortgage, was declared entitled to hold the property as security for the mortgage debt, and for all monies paid by him on the purchase, and for subsequent improvements.

HIPKINS v. AMERY.

ON the 3rd of November, 1852, Captain Bennitt, of Stourton Hall, agreed with Rowland Price to purchase for 1200*l.* the lease of certain premises which had been granted by the trustees of the Kinver School to a Mrs. Davenport, bearing date the 2nd of February, 1846, and on the 3rd of January, 1857, had been assigned by Mrs. Davenport to Price. The agreement provided that, on the signing of the contract, 400*l.* should be paid down, and the remaining 800*l.* on the execution of the assignment, which was to be completed on the 25th of March following. At the date of the agreement Price was in possession of the property, and was paid 400*l.*; and on the 4th of April gave up possession to Captain Bennitt, who thereupon paid him 200*l.* more. On entering into possession, Captain Bennitt's solicitors applied to Price for the abstract of title, who thereupon furnished them with a copy of the lease to Mrs. Davenport, and of her assignment to himself. The copy of the lease disclosed that there were thirteen lessors, of whom two had since died, but that only seven had executed. Price, however, undertook to get the lease executed by the other lessors.

On the 21st of July, 1854, Captain Bennitt paid Price 80*l.* more on account.

Upon Captain Bennitt's solicitors requiring the production of the title-deeds, Price informed them that they were deposited for safe custody with the Stourbridge and Kidderminster Banking Company.

In October, 1857, Captain Bennitt, for the first time, discovered that, at the date of his purchase from Price, by an indenture dated the 29th of July, 1850, in consideration of 600*l.* paid by Joseph Hipkins, Price had assigned

the premises to Hipkins for the residue of the term for which the same were held, less one day, with a proviso for redemption on repayment of the said sum of 600*l*. and interest at 5 per cent. On the 28th of July, 1851, default had been made in payment thereof.

It appeared from the evidence that Price was steward to the trustees of the school, and solicitor to Mrs. Davenport, and had obtained duplicates of the lease from the trustees to Mrs. Davenport, and of her assignment to himself. He deposited the duplicate lease in the first instance with the defendant Amery, who was the manager, but afterwards obtained possession of it, in consequence as was alleged, of the requisition of Captain Bennitt; and having obtained the execution of one more lessor, the lease was returned to Amery.

By an indenture dated the 23rd of June, 1857, between Price and Amery, Price assigned the said leasehold premises to Amery, his executors, administrators, and assigns, for the unexpired residue of the term of eighty years, upon trust, to sell the same, and out of the proceeds thereof to pay all principal monies, interest, &c., due from the said Price to the bank.

On the 6th of November, 1857, Price was adjudicated bankrupt; and on the 26th of November, 1857, Joseph Hipkins filed a bill against Amery, Bennitt, and the assignees of Price to foreclose the mortgage. On the 17th of May, 1858, the assignees disclaimed by their answer, and the bill was dismissed against them.

On the 13th of December, 1858, Captain Bennitt paid off Hipkins's mortgage, amounting to 777*l*. for principal, interest, and costs, and took an assignment of the mortgage debt and the securities.

The bill was then amended by making Captain Bennitt a plaintiff (with Hipkins) against Amery alone. The amended bill alleged that the sum paid by Bennitt exceeded the residue of the purchase-money which remained unpaid, and that the plaintiff Bennett had besides expended a con-

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siderable amount, exceeding 600*l.*, in costs and improvements. The bill further alleged that the plaintiff Bennitt was entitled to an assignment of the term from Amery, and had applied to him for that purpose, but that the defendant Amery had refused to make such assignment. The bill also prayed that, in case it should appear that at the date of the execution of the deed of the 23rd of June, 1847, the defendant Amery had no notice of the agreement for sale, the plaintiff might be declared entitled to stand in the place of Hipkins as first mortgagee, not only for the sum of 777*l.* 12*s.* 9*d.*, but also for the monies expended by him in improvements, &c.; and for costs, charges, and expenses.

The bill, as amended, prayed that the plaintiff Bennitt was entitled to specific performance of the agreement of the 3rd of November, 1852, and that, the plaintiff Bennitt having paid the whole of the purchase-money, the defendant Amery ought to execute to the plaintiff Bennitt an assignment of the premises and deliver up the deeds, and for an order in conformity therewith; and if the Court did not think fit to make such declaration and decree, then that an account might be taken of what was due to the plaintiff William Bennitt on the security of the indentures of the 29th of July, 1850, and of the 13th of September, 1858, including the sums so paid by him, and interest, costs, charges and expenses,—he accounting for the rents and profits of the premises received by him; and that the defendant Amery might be decreed to pay what should be so found due, or in default be foreclosed.

The defendant Amery, by his answer to the original bill, alleged that on the 11th of August, 1851, Rowland Price deposited with him an indenture of lease of the 2nd of February, 1846, and an assignment of the 3rd of January, 1851, as a security for the sum of 2000*l.*, “or any other amount due from him, the said Rowland Price,

to the bank," and gave the defendant a memorandum in writing to that effect; and that the sum of 2444*l.* 13*s.* 9*d.* and upwards then was, and still remained due and owing from Price to the bank. The answer recited the deed of the 23rd of June, 1857, which was made between the said Rowland Price of the one part, and the defendant, as trustee between the said Rowland Price and the directors of the said Stourbridge and Kidderminster Banking Company of the other part, and recited (amongst other things), that the said Rowland Price had become indebted to the said banking company to a considerable amount, and had agreed to execute the then stating indenture. The defendant submitted that the plaintiff's (Hipkins's) mortgage security ought not to be postponed to the charge or security of the bank, by reason of the plaintiff (Hipkins) having fraudulently and improperly permitted the indenture of lease of the 2nd of February, 1846, to remain in the possession of Price, in consequence whereof he, the defendant Amery, and the bank, were led to believe, and did believe, that the sum of 2444*l.* 13*s.* 9*d.* and interest, was a first charge on the said leasehold premises.

By his answer to the amended bill, the defendant Amery admitted he had heard that the plaintiff Bennitt had entered into some agreement for the purchase of the premises, with the date and particulars of which he was wholly unacquainted, except by the bill. He alleged that an indenture of lease, bearing date the 2nd of February, 1846, from the trustees of the Kinver School to Mrs. Davenport, and an indenture of assignment from Mrs. Davenport to Price, dated the 3rd of January, 1851, were, with other deeds and documents, deposited with him by Price on behalf of the bank, on the 11th of August, 1851, as a security for the running balance of his account with the banking company, and he then signed and gave to the defendant a memorandum in the

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following terms:—"I, Rowland Price, of Stourbridge, in the county of Worcester, solicitor, have this day deposited with the manager and directors of the Stourbridge and Kidderminster Banking Company at Stourbridge, the several deeds and documents hereunder written, as a security for the sum of 2000*l.* or any other amount due from me to the said banking company. Dated the 11th day of August, 1851. Rowland Price. Schedule above referred to 2nd February, 1846. Indenture of demise for eighty years from the trustees of Kinver Free Grammar School to Mrs. Mary Jane Davenport. 4th January, 1851. Indenture of assignment from the said Mary Jane Davenport to the said Rowland Price and others." He denied that it was, at the time in the bill alleged, or even verbally agreed with Price that the lease and assignment should stand as a security only for the sum of 1000*l.*; but that, on the contrary, it was understood and agreed that the said deposit should be a security for all monies which should be due at any time during the continuance of the deposit. The defendant further denied that he was aware at or shortly after the date of the alleged contract for sale of such contract, nor did he become aware that there was such a contract till long afterwards. He admitted that early in February, 1855, he met Bennitt, on which occasion he heard that he had entered into some contract with Price with respect to the said property; and he alleged that on this occasion he cautioned him against paying any money in respect thereof, stating that the bank held a security over the property. He alleged that the sums of 400*l.* and 200*l.* were paid in to the credit of Price's general account, and without the bank having received any intimation from Bennitt or any other person as to the sources from whence they were derived. He alleged that when the memorandum was executed, it was agreed between himself and Price that the deposit should be by way of security for the balance, for the time

being, due from Price to the bank on the account current. He alleged that since the date of that arrangement there had always been due from Price to the bank upwards of 2000*l.*, his account being always overdrawn, which the bank had permitted, relying on the deposit of the deeds, which it was agreed should stand as a security for the running account. The defendant alleged that he delivered up the lease (the duplicate) at the request of Price, and in order to enable him to obtain the execution of more of the lessors; but he denied this was done in compliance with the requisitions of Bennitt's solicitors. He submitted that the plaintiff (Bennitt) was guilty of gross negligence in not requiring the original instruments, and alleged that had he done so, he would have discovered the incumbrance on the property. The answer further submitted that the bank was entitled to priority over the plaintiff's security; that the plaintiff was not entitled to tack his own claim to the mortgage to Hipkins.

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By his affidavit in the cause, Price deposed that on the 29th of June, 1850, Hipkins lent him 600*l.*, which it was agreed should be secured by a mortgage of the property. That accordingly, by an indenture dated the 29th of July, 1850, between himself of the one part, and Hipkins of the other part, he, Price, assigned the property comprised in an indenture of lease dated the 2nd of February, 1846, and which by an indenture dated the 27th of July, 1850, had been assigned to him in consideration of the sum of 1500*l.* for the residue of the term of eighty years granted by the said indenture of lease (less the last day thereof), subject to a proviso for redemption. He further said that, on entering into possession, the plaintiff Bennitt, by his solicitors, applied for an abstract of title to the leasehold premises, and he furnished a copy of an assignment from a Mrs. Davenport to himself, dated the 3rd of January, 1851; and subsequently a copy of a lease from the trustees of Kinver Grammar School to the said Mrs.

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Davenport, of the said premises, bearing date the 2nd of February, 1846. In a further affidavit he deposed that the deeds were deposited by him with the bank, and the memorandum signed by him as a security for 2000*l.*, or other the amount due from him to the bank at the time, and that no agreement that such memorandum and deposit should extend to future advances was then or had ever since been made between himself and the bank.

On cross-examination, he deposed as follows:—"Speaking of the deeds of assignment from Mrs. Davenport to myself, in the second and eighth paragraphs of my affidavit, I mean two different deeds of assignment, but both referring to the same property. I cannot say when the deed of assignment of the 29th of July, 1850, was executed. I did not see it executed. I cannot tell whether the deed of assignment of the 3rd of January, 1851, was executed on that day. I wanted money, and did very 'wrong in getting the two deeds, and I got the second in order to raise money on the two. I was Mrs. Davenport's solicitor at the time. I also obtained duplicates of the lease from the trustees, and it is customary in my neighbourhood to obtain duplicates, now that the stamps are the same, instead of a lease and a counterpart. It is usual, when a lease and duplicate are executed, that one part should be left with the lessee and the other with the lessor; but, unfortunately, I was solicitor for them all; and as such I took both the leases, and used them for my own purposes."

Argument.
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Mr. Bacon, Q.C., and Mr. Batten, for the plaintiff.

It was submitted, first, that after the bank received notice of the purchase by the plaintiff, all sums of money paid into the bank to Price's account must be appropriated in satisfaction of the monies then due; and that, consequently, they were not only not entitled to claim against the property for subsequent advances, but the

amount of subsequent payments must be deducted from the amount due at the time of receiving such notice: *Clayton's case*(a).

In *Rolt v. Hopkinson*(b) it was held, overruling *Gordon v. Graham*(c), where there is a mortgage for present and future advances, and a mortgage later in date over the same property, further advances made by the first mortgagee have no priority over antecedent advances made by the subsequent mortgagee. In this case, therefore, at all events, all sums advanced by the bank after notice of the plaintiff's title, must be first proved.

With respect to the omission of the plaintiff to obtain the legal title, it did not follow he was to be foreclosed merely because he had not got the possession of the title deeds; that could only be done in case he were guilty of fraud or gross negligence: *Colyer v. Finch*(d), *Shaw v. Neale*(e), and *Mackreth v. Simmons*(f).

It was contended further, that the plaintiff was entitled, as against the bank, to specific performance of the agreement by Price to assign the legal interest in the term.

Mr. *Malins* and Mr. *Druce*, for the defendants, submitted, first, that the plaintiff had been guilty of gross negligence in not inquiring after the title deeds, and therefore must be held affected with notice of what on inquiry he would have discovered, that is, of the mortgage to *Hipkins* and to the bank: *Hewitt v. Loosemore*(g), *Brace v. The Duchess of Marlborough*(h).

At all events, he took subject to the equitable mortgage to the bank: *Perry Herrick v. Atwood*(i), *Ede v. Knowles*(k).

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(a) 1 Mer. 586.

(b) 3 De G. & J. 177.

(c) 2 Eq. Cas. Abr. 598.

(d) 5 H. L. Cas. 905.

(e) 6 H. L. Cas. 581.

(f) 15 Ves. 328.

(g) 9 Hare, 449.

(h) 2 P. Wms. 491.

(i) 2 De G. & J. 21.

(k) 2 Y. & C. C. C. 172.

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It was quite clear that specific performance could not be decreed against the bank, inasmuch as they had obtained the legal reversion in the term for value and without notice.

THE VICE-CHANCELLOR:—

Bennitt (one of the plaintiffs) contracted to purchase from Price the leasehold property for the sum of 1200*l.*, and at the time of the contract paid 400*l.* in part payment of the purchase-money, without making any inquiry after the title deeds. Of the validity of that contract there is no doubt whatever. But previously to the date of the agreement, Price, without the knowledge of Bennitt, had executed a lease of the property for the whole term less one day to the other plaintiff, Hipkins, to secure the sum of 600*l.* with interest, and as additional security deposited the original deed of lease under which he derived his title. The effect of this underlease was to give Hipkins a title which could not be impeached. The state of the title, therefore, at the date of the contract between Price and Bennitt was this, that there was a reversion in Price, which would pass to any person claiming by assignment from Price. If Bennitt had exercised that degree of caution which this Court requires from a purchaser, he would have made an inquiry for the title deeds, which inquiry would have disclosed that they were in the possession of the co-plaintiff Hipkins, as holding a mortgage over the property.

If Bennitt had learned the whole truth, he would have ascertained not only that Hipkins held the authentic title deeds, but that the Stourbridge Bank held on deposit, with a memorandum, a duplicate of the lease which Price had deposited with his co-plaintiff Hipkins, and also an assignment of the same property for the

same term, but bearing date several months later than the underlease to Hipkins, and therefore a worthless instrument.

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The bank, then, were in this position: on the construction of their memorandum they were entitled to have their debt secured on all Price's interest in the leasehold, and they were entitled to the reversion on the underlease to Hipkins. Neither Price nor any one claiming under him could contend that the bank had not, on the true construction of the memorandum, an equitable right by way of lien or equitable mortgage, subject to any prior charge on the leasehold property now in question.

It has been argued that a purchaser from Price must be held to take subject to every equitable incumbrance to which it would be subject in the hands of Price, and that the plaintiff claiming under his contract with Price, must, therefore, take subject to this mortgage in favour of the bank. But the answer to that argument is that the plaintiff, Hipkins, acquired possession of the title deeds without notice of the mortgage to the bank.

It has been contended that the plaintiff Bennitt, having neglected to require the production of the title deeds, must be held to know not only that the genuine title deeds were in the possession of Hipkins, but also that a fraud had been practised on the bank by the deposit of spurious instruments. In support of this argument the cases of *Hewitt v. Loosemore* and *Colyer v. Finch* have been cited. But there is nothing in these cases, or in any cases, that carries the doctrine of this Court as to negligence the length of holding that a purchaser who omits to call for the title deeds is to be affected, not only with the knowledge which he might have obtained by inquiry that they are in the possession of some holder for

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value, but also with knowledge of a fraud committed by the person of whom he was bound to make the inquiry. There is no rule of this Court which goes that length.

On this part of the case, therefore, Bennitt cannot be regarded as having notice of the fraud committed by Price upon the bank until a period so late as to render his knowledge of no importance. Bennitt, therefore, having purchased Price's interest in the leasehold property without notice of the fraud committed by Price, is, in the view of this Court, a purchaser for value without notice. In this view of the case, Bennitt and the bank have both of them an equitable right against Price's interest in the leaseholds, but the bank is prior in date. Here, therefore, are two innocent purchasers for value, the plaintiff Bennitt and the bank. The plaintiff having neglected to inquire for the title deeds, according to the doctrine of this Court, is fastened with notice that the deeds were in the possession of Hipkins. But now he has obtained a conveyance of Hipkins's mortgage, and having thus got the legal estate, claims to tack the sum which he unwarily paid to Price, the vendor, to the amount of Hipkins's mortgage, of which he has become the assignee; and he claims to hold the property charged with the whole amount of both sums, in priority to the bank. The bank, on the other hand, have the reversion of the lease, that is of the one day, which it is said is of value as carrying the right of renewal.

Such being the position of the parties, the plaintiff Bennitt is entitled to a declaration that he is entitled to hold the property as a security, not only for the amount due on Hipkins's mortgage, but also for the sums he himself advanced to Price, *i.e.* 400*l.*, 200*l.*, and 80*l.*

There remain the questions of appropriation, and of

the right of the bank to specific performance. But in my view of the case these questions have become immaterial.

As regards the question of appropriation, the plaintiff's case is that, from the moment the bank received notice that he was a purchaser from Price of the property pledged to the bank as a security, none of the subsequent advances can be charged against the property. That is the principle which seems to have guided the decision in the case of *Rolt v. Hopkinson*, and it is too plain to require any authority. But the plaintiff goes further, and contends that every payment made to Price's account from the time when the bank became aware of the purchase, must be deducted from the sum due to the bank at the time when they received notice of the purchase, so as, in fact, to leave nothing due to the bank at all. It is impossible to maintain that proposition, because when the bank received notice of the purchase by Bennitt, it was notice that Price was no longer entitled to redeem, and the bank could not, therefore, in law be bound to appropriate monies paid in to Price's account, to the redemption of the property which, it is contended, Price had lost all right to redeem. The question, therefore, that arises in *Clayton's case* cannot arise here, nor at all where there is no right to apply it to the purpose for which it is asked to appropriate it.

With regard to the claim of the plaintiff to specific performance against the bank, it cannot be maintained.

The plaintiff having neglected to obtain the title deeds, is, in this Court, only the purchaser of the equity of redemption, and is, therefore, not entitled against the bank to call for the legal interest which the bank have got, however small that legal interest may be.

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There must be a declaration that the plaintiff, Bennitt, under his title derived from Hipkins, is entitled to hold the leaseholds for the mortgage debt, and for the sums paid by him, viz., 400*l.*, 200*l.*, and 80*l.*, with a declaration that the bank, under their assignment from Price, are entitled to the reversionary interest. There will be an inquiry what sums have been laid in permanent improvements and for redemption.



July 13th.

BROWNE v. BROWNE.

Where the devisee for life, of leaseholds for lives, in the erroneous belief that he was bound to renew, insured the life of the younger *cestui que vie* in the names of himself and the executors, and paid the premiums, and died, leaving the executors him surviving — *Held*, that the insurance monies were subject to a resulting trust

WILLIAM FREDERICK BROWNE, by his will, bearing date the 31st of August, 1835, devised and bequeathed all his real estate situate in the parish of Launton, in the county of Oxford, to three trustees, upon trust for his son William Frederick Browne for life, remainder in favour of his children, with remainders over; and the said testator directed that his said son William F. Browne, when and in case he should come into possession of the said property, should, during his life, when and so often as a life or lives, on which the said property in part was held, should die, renew the same and at his expense reinstate a new life or lives in the room of such as might so happen to die; and in case his

in favour of the devisees under the will, but that the estate of the tenant for life was entitled to the bonuses, but not to be recouped the amount of the premiums.

said son should neglect or refuse so to do within the prescribed time, then he gave, devised, and bequeathed the same lands so held for lives, &c., &c., unto his said trustees upon trust for the benefit of his grandson Richard Thomas Staples Browne.

The property now in question, by an indenture dated the 28th of February, 1826, was demised, as the Manor of Launton, in the county of Oxford, by the Dean and Chapter of Westminster, and described as being then in the occupation of the Earl of Jersey, to the then Duke of Bedford and George Bambridge, their heirs and assigns for and during the natural lives of the Earl of Jersey, aged 53, the Earl of Clarendon, aged 69, and Lord Villiers, aged 18, for and during the life of the survivor of them, at the yearly rent in the said indenture mentioned.

The said indenture contained a proviso for the re-entry of the said dean and chapter in case the lessees, their heirs or assigns, should not, within six months after the decease of the said three lives, or of any of them, give notice thereof to the said dean and chapter.

By an indenture, dated the 14th of August, 1832, the Duke of Bedford and George Bambridge conveyed the said manor house, outbuildings, &c., and 190 acres or thereabouts, forming part of the hereditaments demised by the said dean and chapter, unto the said William F. Browne, his heirs and assigns, for and during the natural lives of the Earl of Jersey, the Earl of Clarendon, and the said Lord Villiers, and for the life of the longest liver, at the yearly rent of 31*l.* 10*s.*, and subject to a land-tax (apportioned) amounting to about 22*l.*

William Frederick Browne died in November, 1857, without having altered his will, which was duly proved by two of the executors named therein, one having renounced. Shortly after his death, William F. Browne, his eldest son and devisee for life, entered into possession of the manor house and lands of Launton aforesaid, and

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received the rents and profits. In December, 1838, the Earl of Clarendon died, but no new life was reinstated in his room, as was directed by the will. In March, 1842, William F. Browne, the first tenant for life, died without issue, and was succeeded by the second tenant for life, Richard Thomas Staples, who took possession of the property and assumed the name of Browne, and remained in possession of the property till his death in May, 1855.

In 1855 a suit was instituted in this Court by F. J. S. Browne, the infant son of R. T. S. Browne, in order to have the trusts of the will administered; another suit was also instituted for the same purpose. In June, 1857, the Court declared that the estates devised by the will of the testator, William F. Browne, had become vested in the infant plaintiff, subject to be divested in the event of his dying under the age of twenty-one. In January, 1856, a receiver was appointed of the said estates, and he paid the premiums on the policies up to the 17th of January, 1860, in ignorance, as he alleged, that the policies formed a part of the personal estate of F. J. S. Browne.

In March, 1859, the widow of R. T. S. Browne married Mr. R. H. Fisher, but prior to her marriage, all the personal estate to which she was then or might become entitled during her coverture, were assigned to trustees upon certain trusts. In October, 1859, the Earl of Jersey died; and on the 24th of October, 1859, Lord Villiers, who had succeeded his father, and was the youngest of the *cestuis que vie* also died—on the happening of which event the sums insured by the policies became payable, together with certain bonuses declared thereon. By an order, dated the 17th of January, 1860, the said monies, amounting with the bonuses which had been received by the surviving executor, were paid into Court and invested in the purchase of 4797*l.* 4*s.* 2*d.*, Three per cent. Bank Annuities.

A memorandum in the following terms was found

among the papers of R. T. S. Browne after his decease :—

“ January 7th, 1843.

“ S. Staples and self met Messrs. Davis and Tubbs at Mr. Tubbs's bank, at Bicester, respecting insuring Lord Villiers's life, instead of putting in a life in the place of Lord Clarendon (as the Dean and Chapter will not allow me to put in a life without Messrs. Wooten and Dickens join, which they refuse to do on the Dean and Chapter's terms), when we agreed to insure Lord Villiers's life for 4000*l.*, which we considered the full value of the property. The trustees were quite satisfied with that sum, Mr. Tubbs undertaking to insure it in the Provident Life Office; 1000*l.* was insured in the Provident, but they would not take the other 3000*l.* on account of Mr. Wooten having insured for 4000*l.*, and they only take 5000*l.* on one life.”

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The trustees of the settlement made on the marriage of the testator's widow, now presented this petition, praying that the said sum of stock and the dividends thereon might be transferred to them, they offering to pay or allow the estate of William F. Browne (the testator), the amount of the premiums paid on the policies by the receiver out of the rents and profits of the testator's estate since the death of the said R. T. S. Browne; or, if the Court should be of opinion that the petitioners were not entitled to the said Bank Annuities, then that the amount of the premiums paid on the policies by the said R. T. S. Browne during his life, for keeping the said policies on foot, might be ascertained and paid to the petitioners as such trustees, with interest thereon, from the date of the payment thereof.

Evidence was adduced, on the part of the respondents, to show that the intention of R. T. S. Browne when he effected the policy was, that the sums thereby secured

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should be a security against the loss of the leasehold property which would happen in the event of the *cestui que vie* dying without a renewal.

It appeared from the evidence and the allegations of the petitioner, that R. T. S. Browne, under the impression that he was bound under the testator's will to renew the said lease, and in order to protect himself against loss, in case both of the *cestuis que vie* should die, on the 9th of June, 1843, effected a policy in the Provident Life Assurance Office for 1000*l.* on the life of the youngest (Lord Villiers), in the joint names of himself and the two acting executors of the will of the testator. On the 24th of February, 1843, he insured Lord Villiers's life in the Sun Life Assurance Office for 3000*l.*, in the joint names of himself and the two executors of the testator who had consented to act. In 1843 he married his wife, who survived him, by whom he left one son, him surviving. He regularly paid the premiums on the policies until his death in May, 1855.

By his will, dated the 8th of December, 1854, R. T. S. Browne devised and bequeathed all his estate and effects to his widow for her own use and benefit, and appointed her the sole executrix of his will. The policy for 1000*l.* was in the possession of one of the executors of the testator's will, who was the agent of the office; but the other policy for 3000*l.* remained in the possession of R. T. S. Browne till his death.

Argument.
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Mr. Bacon and Mr. Speed appeared for the petitioners.

Inasmuch as the first tenant for life had neglected to substitute a new life for the first *cestui que vie*, i.e., Lord Clarendon, the amount which would have been paid for such purpose, and interest thereon from the death of Lord Clarendon, became a debt due from his estate: *Wadley v. Wadley (a)*.

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In this case the first tenant for life was bound to renew, but there was no obligation on any other of the devisees under the will; therefore, as between the tenant for life and those in remainder, each would be bound to bear his share of the burden in proportion to his actual enjoyment of the estate: *Jones v. Jones*(a), *Greenwood v. Evans*(b).

It was quite clear, having regard to the construction of the will, that R. T. S. Browne could not have been compelled to renew during the continuance of his estate, even if one of the *cestuis que vie* had died during his life estate: *White v. White*(c), *O'Ferrall v. O'Ferrall*(d), *Lawrence v. Maggs*(e).

Suppose R. T. S. Browne had effected the policies in his own name, to secure an annuity granted him in consideration of monies advanced by him, it was clear, even though the premiums had been paid out of the annuity, i.e., paid in fact by the grantor, the proceeds of the policies would belong to the insurer: *Gotlieb v. Cranch*(f), *Lea v. Hinton*(g), *Morland v. Isaac*(h). But how could the circumstance that the policies were effected in the joint names of himself and the trustees of the will make any difference? Neither the trustees nor R. T. S. Browne were under any obligation to insure the life of the *cestuis que vie*, or in case of the death of one of the lives to renew the lease. The trustees held the proceeds of the policy on no trust, except for the estate of R. T. S. Browne, by whom the premiums had been paid.

With regard to the payment of the premiums by the receiver out of the rents and profits of the estate without

(a) 5 Hare, 440, 467.

(b) 4 Beav. 44.

(c) 4 Ves. 24.

(d) 1 Ll. & G. 79.

(e) 1 Ed. 52.

(f) 4 De G. M. & G. 440.

(g) 19 Beav. 324; s. c. 5 De G. M. & G. 823.

(h) 20 Beav. 389.

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the knowledge or consent of the executrix and residuary legatee, it was clear that circumstance could not alter the rights of the parties, though it gave to the trustees a lien on the proceeds of the policies to that amount. [*Burridge v. Row*(a), *Drysdale v. Piggott*(b), *Bennett v. Colley*(c), *Dyer v. Dyer*(d), *Triston v. Hardey*(e), *Nightingale v. Lawson*(f), *Stone v. Theed*(g), *Capel v. Wood*(h), *Earl of Shaftesbury v. Duke of Marlborough*(i), *Milnes v. Slater*(k), were cited.]

Mr. *Malins* and Mr. *Faber* appeared for the plaintiff in the suit.

Mr. *R. W. E. Forster* appeared for the remaindermen.

Mr. *Craig*, as *amicus curiæ*, mentioned the case of *Reeves v. Creswick*(l).

The counsel for the respondents were not heard.

Judgment. THE VICE-CHANCELLOR:—

The tenant for life was only one of the three persons in whose names the policies were effected, and his representative, therefore, is not entitled to recover the monies they produced. On the question whether the estate of the tenant for life ought to be recouped the amount of the premiums which were paid out of his estate, from which he derived no advantage, it would seem reasonable, if the case rested there, that those who reap the benefit of the policies effected in this way ought to bear their share of

- (a) 1 Y. & C. C. C. 183.
- (b) 22 Beav. 238.
- (c) 2 M. & K. 225, 232.
- (d) 2 Cox, 92.
- (e) 14 Beav. 332.
- (f) 1 Bro. C. C. 440.

- (g) 2 Bro. C. C. 242.
- (h) 4 Russ. 500.
- (i) 2 M. & K. 111.
- (k) 8 Ves. 307.
- (l) 3 Y. & C. 715.

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the burden. But in this case the tenant for life effected these policies upon an arrangement with the trustees of the will, there being a question whether the tenant for life was bound to renew the lease.

On the construction, it is plain the testator intended the tenants for life in succession should renew the leases, though the will imposes the obligation in express terms upon one only. But, even admitting that it was doubtful whether this obligation existed, it is clear the tenant for life effected these policies in the belief that he was bound to renew the leases, and not with a view to any right to recover back the premiums.

He was not the survivor of the three persons to whom the insurance was payable. Had he survived, there might have been a question whether he could not claim a lien on the monies payable under the policies; and if his legal personal representative had got possession of the fund, it might be doubtful how far this Court would interfere with his possession until this lien had been satisfied. But the result of the arrangement was, that the person to receive the proceeds of the policy was not the tenant for life, but the legal personal representative of the surviving trustee; and he, having acquired the fund, took it impressed with a trust for the benefit of the parties entitled to the estate. The case, therefore, is one in which the tenant for life paid the premiums without any expectation of having them repaid, and without any other intention than to discharge the obligation which he considered was imposed by the will.

With respect to the bonuses, other considerations arise. According to the terms of the insurance companies with the insurers, the bonuses were to be applied in diminishing the premium, or to be paid to the insurers at their option, in which latter case the premium would remain unaltered. Looking to the age of the person whose life was insured, it is not unreasonable to assume that he

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would have elected to receive bonuses accruing in his lifetime, which would therefore form part of his assets, and would belong to his widow, who is his legal personal representative.

There must, therefore, be a declaration that the proceeds of the policies are not assets of the tenant for life, but that so much of the bonuses as are declared during the life of the tenant for life form part of the assets.

The costs of all parties must come out of the funds.

*June 30th,
 July 2nd.*

SEALE v. BULLER.

Where a creditor, after the Master had reported there were no debts, presented a petition charging fraud, and asking leave to go in and prove against the real estate—there being no receiver and no fund in court—the petition was dismissed, but without prejudice to his filing a bill.

GEORGE TEMPLER, formerly of Whitehill, in the county of Devon, by his will, dated shortly before his death in 1843, directed his executors to call in all his outstanding personal estate, and all debts which should be due and owing to him at his decease, and directed them to stand possessed thereof on the trusts thereafter declared. He gave, devised, and bequeathed to his wife and Richard Buller, their heirs and assigns, all his manors, messuages, and real estate, upon trust to sell the same; and directed them to stand possessed of the monies to arise from such sale, and also of the rest and residue of his personal estate thereinbefore mentioned, after payment of all his just debts, legacies, and the charges and expenses of executing the trusts of his will upon certain trusts therein mentioned. He also appointed his said wife and the said R. Buller executrix and executor of his will.

Shortly after the testator's death, the suits of *Seale v.*

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Buller and Seale v. Plunkett were instituted for the purpose of administering the trusts of the will. A decree was subsequently made in the cause of *Seale v. Buller* for, *inter alia*, the usual accounts and inquiries. On the 19th of July, 1850, the Master made his report, which was afterwards confirmed, whereby he found that no one had come under the decree to prove for any debt against the testator's estate, and that there was no debt due to the estate nor to come from the estate other than a sum of 3000*l.*, secured by the testator's covenant in his marriage settlement.

By that instrument, dated the 12th and 13th of January, 1835, certain estates, of which the said testator George Templer was seised in fee, were limited to a trust for a term of ninety-nine years from the testator's death, upon trust that his widow should receive an annuity of 210*l.*, with the usual powers of distress and entry, and, subject thereto, to pay the rents and profits to the heirs and assigns of the said George Templer; and after the expiration of the said term, the said hereditaments were limited to three trustees for a term of 1000 years, upon the trusts thereafter declared, and after the expiration of the said term to the use of the said George Templer, his heirs and assigns. The trusts of the said term of 1000 years were declared to be, to raise 2000*l.* or 3000*l.*, as the case might be, as portions for younger children; in case there should be two such children and no more, then the sum of 2000*l.*; and if the children being daughters should die under age or without being married, then upon trust to re-assign the said trust monies or the securities for the same to the said George Templer, his executors, administrators, and assigns, for his own use and benefit. It was provided that, if George Templer, his executors or administrators, should pay to the said three trustees 3000*l.*, pursuant to the covenant thereafter contained, and also pay to the said trustees 4000*l.*,

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to be held by him upon the trusts thereafter declared, and also after full payment of the annuity of 210*l.*, and all arrears up to the time of the payment of the said sum of 4000*l.*, then the said term of ninety-nine years should cease. It was provided that if the said George Templer, his heirs, executors or administrators, should pay the said sum of 4000*l.*, the trustee should stand possessed thereof in trust, in the first place to pay the said annuity of 210*l.*, and subject thereto in trust for the said George Templer, his executors, administrators and assigns. The indenture contained a proviso for cesser of the term of 1000 years on payment of the said sum of 3000*l.*; and on the trusts of the term being satisfied, George Templer then covenanted with the three trustees to pay them within six months of the marriage the sum of 3000*l.*, to be held by them upon trust for further securing the payment of the said rentcharge, and the sum of 2000*l.* or 3000*l.*, as the case might be, and subject thereto in trust for the said George Templer, his executors, administrators or assigns; it being expressly declared that the said sum of 3000*l.* was intended only as a further security with the said terms for the annuity of 210*l.*, and the payment of the sum of 2000*l.* or 3000*l.* as the case might be.

By an order made in the causes on further directions, dated the 5th of August, 1850, it was ordered that, upon the trustees of the settlement of the 13th of January, 1835, executing a conveyance of a certain estate comprised in the said indenture to the defendant Richard Buller, as trustee of the will, or to the purchasers thereof, the said defendant should, out of the proceeds of the sale, be at liberty to pay to the trustees such a sum as, together with a sum of 300*l.* already received by them, would make up the sum of 3000*l.*, and also out of the said proceeds the sum of 4000*l.*, in satisfaction of the sums of 3000*l.* and 4000*l.* secured to the trustees thereof respectively by the said indenture. And it was ordered that

he should also be at liberty to pay the residue, if any, of the proceeds of such sale into court, to be placed to the credit of *Seale v. Buller*, to an account to be entitled, "The account of the devised estates," subject to the further order of the Court. Further directions were reserved, with liberty to any of the parties to apply to the Court as there should be occasion.

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Richard Buller, in pursuance of the order, in July, 1854, paid to the trustees 2700*l.*, which, with the previous payment of 300*l.*, amounted to 3000*l.*; he also paid the sum of 4000*l.* These two sums of 4000*l.* and 3000*l.* which had been invested in the purchase of 4318*l.* 9*s.* 9*d.* and 3231*l.* 17*s.* 3*d.* Consols, after payment of the costs which had been taxed and paid, formed the whole of the testator's outstanding personal estate. Both these sums were subject to trusts in favour of the two daughters of the testator, and would, in certain events, revert to the testator's estate.

A petition was now presented by a Mrs. Duffield and the trustees of her marriage settlement, dated the 26th of September, 1837, claiming in equity to be a specialty creditor of the testator in the sum of 4000*l.*, with interest from August, 1853, or for the sum of 4435*l.* 7*s.*, with interest on 4000*l.*, from January, 1858, and praying for leave to go in and prove for these sums.

The petition alleged that, by an indenture of the 31st of December, 1834, the testator, George Templer, assigned to Hugh Percy Davison and John Smart, a bond-debt due to the said George Templer, and certain other securities, to secure the repayment by the said George Templer of 4000*l.* and interest in manner therein mentioned; and that by the said indenture the said George Templer, for himself, his heirs and assigns, covenanted with the Messrs. Davison and Smart that he, his heirs, &c., would pay to the said Davison and Smart, their executors, &c., the said sum of 4000*l.* and interest.

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By an indenture, dated the 26th of August, 1840, the above debt of 4000*l.* and interest was assigned by Davison and Smart to Anne Louisa Francklin in consideration of 4000*l.* Subsequently to the death of the testator, by an indenture, dated the 19th of April, 1847, made in contemplation of the marriage of Henry Hope Caulfield and the said Anne Louisa Francklin, the said debt of 4000*l.* and interest was assigned by Anne Louisa Francklin to three trustees, their executors, administrators and assigns, upon the trusts therein mentioned.

That, by an indenture of settlement made in contemplation of marriage, dated the 26th of September, 1837, a sum of 5143*l.* 17*s.* 1*d.* Consols was settled (subject to the life-interest of the petitioner's mother) upon trust during the joint lives of the petitioner Frances Amelia Duffield and her husband, for the separate use of the petitioner, then upon certain trusts for the benefit of the children of the marriage; if the said petitioner should survive her husband, in trust for herself absolutely; if she should not survive her husband, in trust as she should appoint, and in default of appointment, to her next of kin. That Mrs. Duffield was upwards of fifty years of age, and there had been no issue of the marriage. Under these circumstances Mrs. Duffield, on the death of her mother in February, 1857, treated herself as absolutely entitled to the above sum of stock; and, acting under the advice of J. E. Buller, late of the firm of Smart and Buller, Lincoln's Inn Fields, solicitors, she applied for and obtained a transfer of the said sum of stock to herself. It was shortly afterwards sold, and the proceeds, amounting to 4719*l.* 10*s.* 9*d.*, were paid to the said J. E. Buller, who paid the same, on the 28th of July, 1857, into his own account at his bankers', Messrs. Child and Co., Temple Bar. On the 31st of July, 1857, no cheque having been drawn by him in the mean time, he drew a cheque on the bankers for 4435*l.* 7*s.*, and paid the same to

the trustees of Mrs. Caulfield's settlement above mentioned, in consideration of the following assignment. By an indenture dated the 24th of July, 1857, in consideration of 4000*l.* by the said J. E. Buller paid to the said three trustees, the latter assigned the said debt or sum of 4000*l.* and interest to the said John Edward Buller, his executors, administrators, and assigns, for his and their own absolute use and benefit. In the same indenture was contained an assignment of the bond-debt due to the said George Templer.

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The petition alleged that the last-mentioned assignment, though apparently made to John Edward Buller for his own use and benefit, was intended to be taken by him as trustee for the petitioner, Mrs. Duffield, and that he thereby in fact became trustee of the said security in trust for her and others. J. E. Buller paid the petitioner interest on 5000*l.*, being the amount represented by him to have been produced by the sale of the said sum of Consols, down to the 24th of January, 1858, since which time the petitioner had received nothing. In August, 1859, J. E. Buller was adjudicated a bankrupt. The petitioner further alleged that he had since discovered that the said bond-debt, expressed to be assigned to John Edward Buller as a security for the sum of 4000*l.* and interest, no longer existed, the whole of such debt having been already received.

The petitioner alleged that the executor of the testator's will had been charged in account by the firm of Smart and Buller with interest on 4000*l.* down to the 26th of August, 1853, and there remained due from the estate of the testator 5170*l.*, or thereabouts, on that account.

The petition prayed that the petitioners, or one of them, might be allowed to go in and prove their debt, that the reversionary interests which might fall into the testator's estate, under the settlement of the 13th of

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January, 1835, might be sold, and the proceeds applied in payment of the amount found due to the petitioners.

Evidence was adduced in support of the petition to show that interest had been paid on the amount due to the petitioners by the firm of Smart and Buller, acting, as was alleged, as the agent of George Templer, and then of Richard Buller, down to the year 1853. Mrs. Duffield, by her affidavit, deposed that, "acting under the advice of John Edward Buller, of the firm of Smart and Buller, she applied to the trustee of her settlement for the transfer or payment to her of the said sum of Consols, and it was subsequently arranged between herself, acting under such advice, and the said trustee, that the said sum should be sold, and the proceeds remitted to the said John Edward Buller, and invested on mortgage."

Evidence was adduced on behalf of the respondent to show that no interest had been paid by the testator, or his executors or agents, to Miss Francklin, or to any person on her behalf, and that no charge was made in the executors' accounts for interest.

Evidence was adduced in reply to prove payment of interest.

Argument.

Mr. Bacon and Mr. F. O. Hayes, for the petitioners, contended, on the evidence, that the petitioners were entitled to leave to go in and prove for the amount of their debt.

Mr. Malins and Mr. Hetherington, Mr. Greene and Mr. Stuart, Mr. Eddis, Mr. W. W. Cooper and Mr. Jessel appeared for the several respondents.

An objection was taken that, there being no fund in court, and nothing undistributed but the real estate, the Court had no jurisdiction to make the order asked in the petition.

Mr. Bacon, in reply to the objection.

The whole estate is under the dominion of the Court, because whatever is vested in trustees where it has been instituted to administer a trust estate is in fact under the control of the Court. Moreover, if a bill had been filed against the trustees, the first objection to such bill would be that the monies were under the dominion of the Court.

It was submitted, therefore, that the proper mode of applying was by petition.

Gillespie v. Alexander (a) was cited.

[THE VICE-CHANCELLOR referred to the case of *Greig v. Somerville* (b).]

THE VICE-CHANCELLOR:—

No authority whatever has been adduced to show that, as against the heir to whom real estates have descended, or as against devisees claiming to be entitled to real assets, the Court has ever interfered, upon petition, on behalf of a creditor who did not come in in time.

In the absence of authority, the case must be regulated by principle.

In the case of *Gillespie v. Alexander* a petition was entertained, and the principle upon which it was entertained was stated in the clearest terms by Lord Eldon. Lord Eldon said: "If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees and bring back this fund, he may do so; but he cannot affect the legatee except by suit, and he cannot affect the executor at all."

Now, if he cannot affect the legatee, whose money is not in court, except by suit, upon what principle can he affect an heir or devisee, there being no receiver, and no

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(a) 3 Russ. 130.

(b) 1 Russ. & M. 338.

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funds with which the Court can deal as proceeds of the real estate, subject to any trust in favour of the petitioner?

It is with the greatest regret that I dispose of any case, especially a case of this kind, upon an objection in point of form. But when it is a question whether a petitioner with such a claim as the present should file a bill, or have the case entertained upon petition, it is much more than a mere matter of form (seeing the very serious allegations made by the petitioner, the very formidable relief which is prayed against persons who are not before the Court, the Court not having in its hands the property which is claimed by the plaintiff) to consider whether the matters put in issue should not be solemnly adjudicated upon in the more appropriate form of a suit, rather than in the shorter form of a petition. The petition contains allegations of fraud—of conduct of the most extraordinary kind in the conduct of this very cause—and if the petitioner has that *prima facie* case which she seems to have, she must assert her right by bill, and not by petition. I must dismiss the petition, but without costs, and without prejudice to the right of the petitioner to file a bill.

GRATRIX v. CHAMBERS.

1860.

July 6th.

JAMES CHAMBERS, by an informal instrument, dated 28th of July, 1842 (which had been prepared as instructions for his will, but had been duly executed, until a more formal one could be prepared), devised all his real and personal estate to trustees, upon the trusts, &c., that is to say, as to his estate in Hulme, upon trust for Elizabeth Hall for life, with remainder to her children and issue, with remainder, as to one moiety, upon trust for defendant John Hardcastle Richardson for life, with remainder to his children and issue, in same manner as thereafter declared concerning testator's Oxford Road estate, with remainder to Mary Roberts (since deceased, the mother of the defendant Ellen Roberts) and her children and issue, in the same manner as the other moiety was thereby given. And as to the other moiety, upon trust for Mary Roberts for life, with remainder to her children and issue, in same manner in all respects as was thereafter provided concerning the share given to her in the testator's Oxford Road estate.

And the said testator thereby declared that as to his Oxford Road estate, the same should be held by his said trustees, as to one moiety thereof for the said John Hardcastle Richardson for life, with remainder to his children and issue, with remainder upon trust for the said Mary Roberts and Elizabeth Hall, in equal shares; and after the death of either of them, as to her share for her children and their heirs in the same manner as thereby provided concerning the lands devised in trust for them, the said Mary Roberts and Elizabeth Hall, "provided

Where an annuity was given by will, charged on the *corpus* of a fund, with a provision for forfeiture in the event of certain contingencies, the Court held that the annuitant was not entitled to have the gross value of the annuity paid out of the *corpus* on the principle of *Wroughton v. Colquhoun* (a), but was entitled to have the accruing payments of the annuity made good, if necessary, out of the *corpus*, as in *Wright v. Callander* (b).

(a) 1 De G. & Sm. 357.

(b) 2 De G. M. & G. 625.

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that each of the shares of John Hardcastle Richardson, Mary Roberts, and Elizabeth Hall, and their respective children, shall be subject to the payment of 20*l.* a year (making 60*l.* a year in the whole) to their father John Richardson, from the death of my said wife during the life of the said John Richardson, to be paid to him without anticipation. If he become bankrupt, or take the benefit of any Act now or hereafter to be in force for the relief of insolvent debtors, or charge or anticipate the same, then his interest to cease as if he were dead."

The will did not contain any express devise of the other moiety of the Oxford Road estate.

The testator died in 1847 without having executed any more formal will, as contemplated when the instructions were prepared; and probate of the above instrument was granted to the executors, who were the same persons as the trustees. Shortly after his death, a suit was instituted by the trustees and executors for the administration of the trusts of the will, and usual accounts and inquiries were directed.

On first hearing, on further consideration, all the testator's property was ordered to be sold, and the proceeds of the sale of the Oxford Road estate were ordered to be carried to a separate account—the proceeds of the sale of the Oxford Road estate.

On the second hearing, on further consideration, it was declared that one-fourth of the fund standing to the credit of the proceeds of the sale of the Oxford Road estate was devised to Ellen Roberts on her attaining twenty-one, one-fourth part thereof to Elizabeth Hall and her children, and two-fourths to John Hardcastle and his children. And it was also declared that the money standing to the account "the proceeds of the sale of the Oxford Road estate," was subject to the payment of the said annuity of 60*l.* to John Richardson, in manner fol-

lowing, that is to say:—J. H. Richardson, two-fourths, was subject to 20*l.*, the one-fourth of Elizabeth Hall and her children was subject to 20*l.*, and the one-fourth of Ellen Roberts was subject to 20*l.*, but without prejudice to the question whether the said annuity had been charged, &c.

Out of these three sums a sum of 634*l.* was taken equally, and carried over to an account, “The annuity account of John Richardson, subject to the question whether he has forfeited the same.”

John Richardson assigned the arrears which had actually accrued due to Mr. Thorneley to secure 390*l.* and interest.

After the above deductions, the shares were as follows:—

John H. Richardson	}	share amounted to about . £670		
and children's				
Elizabeth Hall and	}	do.	do.	. 335
children's				
Ellen Roberts's		do.	do.	. 335

Thorneley and John Richardson now presented a petition praying for the payment of 390*l.* to Thorneley out of the sum of 634*l.*, and for payment of the balance thereof to John Richardson, and for directions as to the annuities.

Mr. *Bury*, in support of the petition, contended that John Richardson, the annuitant, was entitled to have a valuation set on the annuities of 20*l.* and 20*l.* issuing out of the shares of the Halls and Roberts, and the amount of such valuation paid to him out of the *corpus* of their shares, *Wroughton v. Colquhoun* (a), or else to payment of the annuities of 20*l.* and 20*l.* out of the income of those shares; and so far as the

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(a) 1 De G. & S. 357.

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income thereof in each year was insufficient, to have the deficiency made good out of the *corpus* thereof: *Wright v. Callander*(a).

Mr. *Renshaw*, for Elizabeth Hall and her children, and Mr. *Hislop Clarke*, for Ellen Roberts, opposed, and submitted that all that the petitioner, John Richardson, was entitled to, was to have a valuation set on the annuities, and then to have the annuities of 20*l.* and 20*l.* paid out of such valuation during his life, or until he should charge, &c. &c., the same: *Carr v. Ingilby*(b).

Mr. *C. Hall* for John Hardcastle Richardson.

Judgment.

THE VICE-CHANCELLOR said he thought that the proviso as to forfeiture prevented the principle of the case of *Wroughton v. Colquhoun* from being applied. But that the petitioner was clearly entitled to have payment of his annuity in full out of the shares of the Halls and Roberts, even though the whole funds should thereby be exhausted, as the annuities were given out of the property itself, and not merely out of the income.

The costs must be paid out of the three funds rateably.

(a) 2 De G. M. & G. 652.

(b) 1 De G. & S. 362.

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July 21st.

JOSHUA DRINKALD, by his will, dated the 1st of September, 1858, after giving numerous legacies and specific devises, made the following disposition:—

The proceeds of growing crops of wheat, oats, rye grass, clover, and trefoil, held to be savouring of the realty, and within the Statute of Mortmain; and therefore not applicable to pay legacies to charities which the testator directed to be paid out of pure personality.

“I give the sum of 3000*l.* to or for the benefit of the Middlesex Hospital in Charles Street, London, and the sum of 2000*l.* for the benefit of the Royal Free Hospital, in Gray’s Inn Road, London, and I direct that the receipt of the treasurer or of the managers and trustees for the time being of the said respective hospitals shall be a sufficient discharge for the same. I give the sum of 500*l.* to or for the benefit of the school in Stafford Street, Mary-le-bone, Middlesex, attached to Christ Church district. And I direct that the receipt of the treasurer or of the managers and trustees for the time being of the said school shall be a sufficient discharge for the said sum. I give the sum of 1000*l.* to or for the benefit of the Western General Dispensary, situate and being No. 266, Mary-le-bone Road, in the county of Middlesex, and I direct that the receipt of the treasurer or of the managers and trustees for the time being of the said dispensary shall be a sufficient discharge for the same. I wish each of the two last-mentioned legacies to form part of the endowment fund of the respective institutions to or for the benefit of which such legacies are given if such a fund exists, if not, then to be applied to the general purposes of such institutions respectively. I give the sum of 1000*l.* to or for the benefit of the Dreadnought Seamen’s Hospital ship, which lies in the River Thames, off Deptford, and the offices of which institution are in King William Street, and I direct that the receipt of the treasurer or of the managers and trustees for the time being of the last-mentioned institution shall be a

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sufficient discharge for the same. My late brother John Drinkald was a zealous working member of the first committee formed for promoting the objects of this useful charity, in conjunction with the late Admiral Young, Captain Willoughby, R.N., Mr. Snodgrass, Mr. Alderman Rowcroft, and Captain Lochner, E.I.C.S. I give the sum of 5000*l.* to the treasurer for the time being of the Corporation called the Marine Society, London, for the use of the said Marine Society, for the purposes for which the same institution was originally founded, but not to be applied in or towards the erection of buildings, and I declare that the receipt of such treasurer for the time being of the said Marine Society shall be a sufficient discharge for the same. I give the sum of 4500*l.* to the treasurer for the time being of the 'London Hospital' in the Whitechapel Road, London, for the use and benefit of that institution, and his receipt shall be a sufficient discharge for the same. I give the sum of 500*l.* to the treasurer for the time being of the Samaritan Society, instituted for relieving such distress of patients at the London Hospital as is not within the provision of hospitals for the use and benefit of the said Samaritan Society, and his receipt shall be a sufficient discharge for the same. I declare that the directions hereinbefore given as to the parts of my estate out of which my just debts, funeral and testamentary expenses, and the legacies given by me are to be paid, shall not apply to the legacies hereinbefore given to or for charitable institutions, viz., the legacies to or for the benefit of the Middlesex Hospital, the Royal Free Hospital, the School in Stafford Street, the Western General Dispensary, the Dreadnought Seamen's Hospital Ship, the Marine Society, the London Hospital, and the Samaritan Society. And I direct that such last-mentioned legacies shall be paid out of that part of my personal estate, which shall at my death consist of pure personalty."

By a codicil to his said will, after giving numerous other legacies, he gave and devised to the use of T. S. Fielder, W. Symonds, and F. J. Ridsdale, their heirs, executors, &c., his freehold farms at Rudgwick, in the county of Sussex, "and the timber, live and dead farming stock, implements of husbandry, growing crops, and all other effects belonging to him which should be in and about the said farms and land at the time of his decease," upon trust to sell "and stand possessed of and interested in the monies to arise thereby, upon trust as to the whole of the same monies, except such as shall arise from pure personalty, to pay the same unto Mr. Robert Keeling, or to invest the same in his name in the public stocks or funds of Great Britain, as he might direct." He also declared that the trustees or trustee for the time being should stand possessed of and interested in "the residue of the monies arising by such last-mentioned sale as part of his residuary personal estate."

The testator then proceeded as follows:—

"I give devise and bequeath unto the said Thomas Edward Fielder, William Symonds, and Francis James Ridsdale, their executors, administrators, and assigns, according to the nature and quality thereof respectively, all the rest residue and remainder of my real and personal estate and effects, whatsoever and wheresoever, upon trust that they or other the trustees or trustee for the time being of my will do and shall with all convenient speed after my decease call in and convert into money my said residuary personal estate, or such part thereof as shall not consist of money, or government securities, stocks, or funds, and do and shall absolutely sell and dispose of all my residuary real estate and stand possessed of and interested in the monies to arise from the sale hereinbefore directed to be made of my residuary real estate, and to arise and be produced from that part of

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my residuary personal estate which I have directed to be converted into money, and of and in the monies, government securities, stocks, or funds, constituting the other part of my residuary personal estate, upon trust, in the first place to apply the monies arising from the sale hereinbefore directed to be made of my residuary real estate as shall at my death savour of realty or shall not consist of pure personalty, in or towards payment of my just debts, funeral and testamentary expenses, and the legacies given by my will or by this or any subsequent codicil thereto (except the legacies to or for charitable institutions), and of the succession and legacy duties hereinbefore directed to be paid out of my estate, and upon trust by with and out of the remaining part of my residuary personal estate (being that part of my residuary personal estate which at my death shall consist of pure personalty), to pay so much and such part, if any, of the same debts, funeral and testamentary expenses, and legacies, succession, and legacy duties as the other parts of my residuary estate shall have been insufficient to pay, and also the legacies by my said will or any codicil thereto given to or for charitable institutions. And upon further trust to pay and divide what shall remain (after answering the purposes aforesaid) of the monies arising from that part of my residuary personal estate which shall at my death consist of pure personalty unto and between the charitable institutions in my said will mentioned in proportion to the sums by my said will given to or for their benefit respectively. And I declare that the directions in my said will contained as to the receipts which shall be sufficient discharges for the legacies therein given to the said charitable institutions shall extend and be applicable to the bequests in their favour hereinbefore contained. And I hereby also declare that it shall be lawful for the trustees or trustee

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for the time being of my will to make sale of the real estates and other property hereinbefore directed to be sold, either entirely and altogether or in parcels, by public auction or private contract, to any person or persons willing to become the purchaser or purchasers thereof respectively, for such price or prices or sum or sums of money as to them or him the said trustees or trustee shall seem reasonable, and subject to such special or other conditions or stipulations as to title or otherwise as they or he shall think fit, and for promoting and facilitating such sale or sales to enter into make or execute all such contracts covenants agreements conveyances surrenders assurances acts deeds matters and things, which to my trustees or trustee shall seem reasonable. And I declare that the receipt or receipts of the said trustees or trustee for the time being of my will for any money payable under my will or any codicil thereto, shall effectually discharge the person or persons paying the same from being answerable or accountable for the misapplication or non-application thereof or of any part thereof, or to inquire into the necessity of any such sale. I direct that the said Francis James Ridsdale shall be at liberty to make the usual professional charges against my estate for any business done by him either alone or in partnership with any other person or persons as an attorney or solicitor in connection with the executorship and trusts of this my will, and that the said Francis James Ridsdale and his partner and partners (if any) shall receive the amount of such charges out of my estate, notwithstanding his being one of my executors and trustees, and notwithstanding the legacies given to him by me. In all other subjects I confirm my said will."

The testator died on the 30th of March, 1859, and a bill was shortly afterwards filed by his acting executors, to administer the trusts of the will against the Marine

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Society as representing the residuary estate of the testator. On the 18th of February, 1860, the usual administration decree was pronounced, in pursuance of which, the chief clerk, by his certificate, dated the 7th of July, 1860, testified that the executors had received for personal estate not specifically bequeathed, 31,894*l.* 7*s.* 3*d.*, and had paid, or were entitled to be allowed on account thereof, sums amounting to 31,310*l.* 18*s.* 7*d.*, leaving 583*l.* 8*s.* 8*d.*, due from them on the balance of the account. He also certified that the sum of 1400*l.* 0*s.* 8*d.*, being part of the said sum so received, consisted of personal estate savouring of realty, unless the Court should be of opinion that the sum of 854*l.* 15*s.*, being the produce of the sale of wheat, oats, rye grass, clover, and trefoil, is, under the construction of the Statutes of Mortmain, to be also construed as savouring of realty, in which case the said sum of 854*l.* 15*s.*, less its proportion of the expenses of the sale, would have to be added to the sum of 1400*l.* 0*s.* 8*d.*

The said crops were growing at the time of the testator's decease.

Argument.

Mr. *Elmsley* and Mr. *Prendergast*, for the plaintiffs, submitted the question to the Court.

Mr. *Druce*, for Mr. Keeling, took no part in the argument.

Mr. *E. Webster* for the Marine Society.

The question is whether the growing crops are pure personal estate; but it was settled that growing crops would not pass under a devise of farming stock, except there was an intention on the will that the devisee should take the personal estate: *Vaisey v. Reynolds* (a). See also *Blake v. Gibbs*, *Steward v. Cotton* (b).

(a) 5 Russ. 12.

(b) Ibid. note.

In *West v. Moore* (a), money and the stock on his farm, and all other his personal estate, was held to give the growing crops of corn to the executor and not to the devisee of the land.

The same question had often arisen at law on the Statute of Frauds, but there was some conflict in the authorities. In *Evans v. Roberts* (b), it was held that a growing crop of potatoes was not an interest in land within the 4th section of the Statute of Frauds.

[*Crosby v. Wadsworth* (c), and *Johnston v. Swann* (d), were cited.]

Mr. *Hallett*, on behalf of the Royal Free Hospital, contended that, though the growing crops were a produce of the land, they were in fact personal estate. A canal was inseparably connected with the land, but it had been held that canal shares were not an interest in land: *Walker v. Milne* (e).

Mr. *Bacon* and Mr. *Bush*, on behalf of the Seamen's Hospital, also contended that growing crops were not an interest in land, and cited *Cox v. Godsalve* (f), in which it was held that unreaped crops passed as goods and chattels, and not to the devisee of the land. They also cited *Hayter v. Tucker* (g). There was a distinction between growing crops. "Of fruits, some be *industrial*, and some *natural*. By *industrial* I mean such as be sown in the ground by man's industry, in hope not to continue there still, but to be separated and reaped with increase ere long. And these kind are moveable *habitu* in the intention of the sower, and therefore the legatary to whom the testator hath bequeathed his moveables may

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(a) 8 East, 339.

(b) 5 B. & Cr. 829.

(c) 6 East, 602.

(d) 3 Madd. 457.

(e) 11 Beav. 507.

(f) 6 East, 604, note.

(g) 4 K. & J. 243.

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recover the corn standing on the ground at the death of the testator," &c. (a). [THE VICE-CHANCELLOR called the attention of the counsel to the case of *Myers v. Perigal* (b).] That was a case of shares in a railway, and its connexion with land never could be severed, but it was admitted that the crops when cut were pure personal estate.

Mr. *Hinde Palmer* and Mr. *Dickinson* claimed the benefit of the above arguments, and cited *Jones v. Flint* (c).

Mr. *Cotton* also adopted the above arguments, and cited the case of *Edwards v. Hall* (d).

See also *Carrington v. Roots* (e).

Judgment.

THE VICE-CHANCELLOR :—

It has been repeatedly decided that by a devise of land growing crops will pass. And why? Because they are so essentially connected with the land that it is unnecessary to describe them specifically. It might have been supposed that that would have been enough to decide the present question.

In this case the testator directs that his timber, live and dead farming stock, implements of husbandry, growing crops, and all other effects belonging to him, which should be in and about certain lands of his at the time of his death, should be sold, and that such of the monies arising from the sale as should be the produce of pure personalty only, should be divisible among certain charities. If, then, growing crops would pass under a devise of land and houses, how is it possible to

(a) 2 Swinburne, Wills, 934.

(b) 2 De G. M. & G. 599.

(c) 10 Ad. & Ell. 753.

(d) 11 Hare, 1; s. c. 6 De G. M. & G. 74, 92.

(e) 2 M. & W. 248.

hold that the legacies which he has given to these charities, and which he has directed to be paid out of monies arising from the sale of pure personalty, will be so paid if they are to be paid out of the proceeds of growing crops?

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There must, therefore, be a declaration that the proceeds of the growing crops mentioned in the certificate are savouring of the realty within the Statute of Mortmain; and are therefore included in the gift to Mr. Keeling, and must be paid to him accordingly.



CLARKE v. CLAYTON.

July 25th.

THE testator, John Clayton, by his will, dated the 7th of September, 1840, devised all his freehold and copyhold estates, wheresoever situate and being, on trust, as to one undivided third part, for his grandsons, S. and J. Clayton, as heirs in common. As to one other undivided third part, upon trust to pay the rents and profits, to his daughter, Anne, the wife of the Rev. H. Fenton, for life, and after her death the said share was to be held for J. W. Fenton, his heirs and assigns for ever; and as to the remaining undivided third part, on trust to pay the rents and profits to the testator's daughter, Elizabeth, the wife of L. A. Robinson, for life, remainder in trust for her children, and in case there should be no children of his said daughter, Elizabeth, or, being such, they should

The Court, in a suit for partition, will not in general direct a commission to issue, but will make a declaration that the estate ought to be divided, with liberty to the parties entitled to bring before the judge at chambers proposals for a partition.

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die under twenty-one without leaving lawful issue, then the said one-third share should be held in trust for the said S. and J. Clayton, their heirs and assigns, in equal shares, as tenants in common.

The testator died on the 1st of October, 1841, and Anne Fenton died in 1845. By deed, dated the 13th of June, 1850, S. Clayton assigned all his share by way of mortgage, subject to redemption. He died in July, 1850, having devised all his real and personal estate to Joseph Clarke and his widow, upon certain trusts in favour of her infant daughter. His widow subsequently married J. Lewis.

The testator's daughter, Elizabeth, in 1853, died without having had issue, and on her death the share of which she had been tenant for life passed in equal moieties to the devisee of S. Clayton's will and J. N. Clayton.

The bill was filed by the devisees of S. Clayton's will, jointly with his widow and infant daughter, against S. Clayton's mortgagees and the parties representing the other share, and praying, "that a commission might be directed to issue out of and under the seal of this honourable Court, for the purpose of making a fair and equal partition of the hereditaments constituting the real and personal estates of the said testator, John Clayton, and to divide and allot the same hereditaments in equal third parts; and that one equal third part in value of the said hereditaments might be allotted and conveyed and assured, subject as aforesaid, in severalty to the plaintiffs Joseph Clarke and Elizabeth Lewis, as such legatees and devisees in trust, of the said Sykes Clayton, deceased, as aforesaid; and one other equal third part thereof to the defendant John Henry William Fenton; and the other or remaining equal third part thereof to the defendant, John Naylor Clayton; and that the plaintiffs Joseph Clarke and Elizabeth Lewis, and the defendant John

Henry William Fenton, and the defendant John Naylor Clayton, might severally hold and enjoy their respective allotments of the said hereditaments according to the respective tenures thereof in severalty; and that all proper conveyances, assignments, and assurances might be executed by the defendant John Naylor Clayton, and all other necessary parties, for carrying the said partition into effect; and that all proper directions might be given for effectuating the purposes aforesaid."

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Mr. *Lewis* and Mr. *Joseph Napier Higgins* appeared for the plaintiffs, and asked for a commission.

Argument.

Mr. *Malins* and Mr. *C. Barber* appeared for the defendants.

THE VICE-CHANCELLOR:—

A commission in a partition suit is a very expensive and generally a very unnecessary proceeding. Under its improved practice, the Court can give facilities for dividing the estate in a way much more satisfactory and less expensive than the old mode of proceeding by commission, even in cases where there is adverse litigation.

Judgment.

There must be a declaration that the estate ought to be divided into equal third parts, and then that the parties are entitled in the proportion which has been shown, with liberty to each of the parties to bring in proposals, before the judge in chambers, for partition.

The following decree was drawn up:—"Upon motion for a decree, &c., this Court doth declare that the hereditaments constituting the real and leasehold estates of John Clayton, the testator in the pleadings named, ought to be divided and partitioned into equal third parts, and doth order and decree the same accordingly. And it is

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ordered that one of such third parts thereof be allotted in severalty to the plaintiffs Joseph Clarke and Elizabeth Lewis, as devisees or legatees in trust of Sykes Clayton deceased, in the pleadings named, and subject to the indenture of mortgage, dated the 13th of June, 1850, in the pleadings mentioned, one other third part thereof to the defendant John Henry William Fenton, and the remaining third parts thereof to the defendant John Naylor Clayton. And it is ordered that proposals for a partition of the said hereditaments among the persons hereinbefore named, and in the proportion hereinbefore mentioned, be laid before the judge for his approval. And it is ordered that the plaintiffs Joseph Clarke and Elizabeth Lewis, and the defendants John Henry William Fenton and John Naylor Clayton, do hold and enjoy their respective thirds in severalty, according to such allotments, and do execute mutual assurances to each other of such respective thirds, according to their respective interests therein, such assurances to be settled by the judge, in case the parties differ. And it is ordered that the defendant John Naylor Clayton do convey, assign, and assure the legal estate in one third part of the said hereditaments allotted to the plaintiffs Joseph Clarke and Elizabeth Lewis, to the said plaintiffs Joseph Clarke and Elizabeth Lewis, and the one other third allotted to the defendant John Henry William Fenton, to the said John Henry William Fenton, and do hold the remaining one third part in severalty for himself. And it is ordered that the deeds and writings relating to the said hereditaments in the custody or power of any of the parties be upon oath brought before the judge as he shall direct, and that such parties thereof as belong to the premises that shall be allotted to each or either of the said parties be delivered to, or be retained by them respectively, and that any of the parties shall be at liberty to apply at

chambers as to any of the deeds or writings as belong to the premises that shall be allotted to two or more of them; and any of the parties are to be at liberty to apply as there shall be occasion."

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COURTENAY v. WRIGHT.

Dec. 6th.

THE original bill in this case was filed on the 11th of September, 1847, against Charles Wright, to redeem an annuity.

The bill averred that, in the year 1824, C. B. Courtenay, the late husband of the plaintiff, being desirous of borrowing the sum of 1000*l.*, on the treaty for the said loan, it was agreed between C. B. Courtenay and C. Wright that Wright should receive interest on the said sum of 1000*l.* at 7 per cent., and should effect an insurance on the life of the plaintiff, and that payment of the interest on the loan and of the premiums on the policy, should be secured by a warrant of attorney of Courtenay and one Bolton, and by an assignment of certain premises in Long Acre, to which

Where the relation of debtor and creditor subsists, and a policy of assurance is effected by the creditor, directly or indirectly, at the expense of the debtor, under circumstances which show that it was intended as a security or indemnity to the creditor, he is bound, on payment of the debt, to deliver up the policy of assurance.

The same principle applies to the case of a life annuity, and accordingly where the grantor came to redeem and repay the principal money, and have the judgment debt due to the grantee satisfied and the securities delivered up, the grantee was decreed on payment to deliver up the policy of assurance.

The cases of *Gottlieb v. Cranch* (a), *Leu v. Hinton* (b), and *Drysdale v. Piggott* (c), considered.

(a) 4 De G. M. & G. 440.

(b) 5 De G. M. & G. 823.

(c) 22 Beav. 238.

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the plaintiff was entitled to her separate use, with remainder to her children by the said Courtenay.

The following allegation was introduced by amendment:—

That the plaintiff inquired of her solicitor, Mr. Harvey, who was also the solicitor of Wright, what assurance office she should go to, when he replied, that she might please herself, as in the event of the redemption of the annuity, the policy and any bonuses declared upon it would be her property.

The bill alleged that, in order to carry the arrangement into effect, an indenture was made between C. B. Courtenay and the petitioner of the first part, one Bolton, since deceased, of the second part, Charles Wright of the third part, and E. Burnham, of the fourth part, whereby—after reciting among other things, an indenture of lease and an indenture of appointment and release, bearing date respectively, the lease the day next before the day of the date of the appointment and release, and the appointment and release bearing date on or about the 8th day of April, 1813, and made or expressed to be made between the said C. B. Courtenay of the one part, William Cooke, Esq., of the second part, and Thomas Stinson and the said Cowling Bolton of the third part, and grounded so far as the same operated by way of appointment and release on a lease for a year, bearing date the day next before the day of the date of the same indenture of appointment and release, as therein mentioned; and also reciting that the said C. B. Courtenay was desirous of making a provision for the plaintiff and the children of the said C. B. Courtenay by the plaintiff—it was witnessed that, for the considerations therein mentioned, the said C. B. Courtenay, pursuant to a power limited and reserved to him, as in the same indenture mentioned, irrevocably directed and appointed

that the premises, &c., should remain and be to the several uses therein declared. And the said William Cooke did, at the request of C. B. Courtenay, grant to T. Stinson, since deceased, and Bolton, the same premises, to the use of Stinson and Bolton, their heirs and assigns, upon trust for repairs, &c., and then for the plaintiff and her children. The same indenture then recited that the said C. B. Courtenay and his wife (the plaintiff) had contracted and agreed with the said C. Wright for the absolute sale to him of one annuity or clear yearly sum of 105*l.* 17*s.* 6*d.*, to be paid to the said C. Wright, his executors, administrators, and assigns, during the natural life of the plaintiff, to be secured in manner thereafter named, for the price of 999*l.*, and—reciting that it was intended that the said C. B. Courtenay and Bolton should, immediately after the execution of these presents, execute a deed poll, or warrant of attorney for 2000*l.* for money borrowed and costs of suit, and also reciting that it was intended that judgment should be immediately entered up on the said warrant of attorney—it was by the said recited indenture witnessed, that, in consideration of the sum of 999*l.*, by the said C. Wright paid to the said C. B. Courtenay, the plaintiff, they the said Courtenay, the plaintiff, &c., did, each of them, for herself, himself, and the plaintiff, in respect of her separate estate, appoint and did agree with the said C. Wright, his executors, administrators, and assigns, that they would pay the said annuity by quarterly payments on the &c. in every year, without any deduction or abatement whatsoever, and if the plaintiff should depart this life on any other day than one of the said quarterly days of payment, a proportionate part thereof. And the said indenture contained a covenant that the plaintiff would at any time thereafter, at the request and desire of the said Charles Wright, appear in person at any

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office of insurance within the cities of London and Westminster, in order that the said Charles Wright, his executors, administrators, or assigns, if he or they should think fit, might insure the life of the plaintiff in any sum not exceeding 1000*l.*; and that the plaintiff would not leave the kingdom during the subsistence of the said annuity without giving twelve months' notice to the said Wright, that he might make known the same at the insurance office where the plaintiff's life was insured; and that the additional premiums for the purpose of keeping on foot any policy or policies of insurance which the said Charles Wright, his executors, administrators, or assigns should effect, for any sum not exceeding 1000*l.*, might be paid to the said insurance office in order to prevent any loss or damage to the said Charles Wright; and further, that they the said C. B. Courtenay, C. Bolton, and the plaintiff, or one of them, should pay to the said Charles Wright, his executors, administrators, or assigns, all sums which he might pay to the said office or offices for additional premiums within one calendar month after such payment, and that the said Burnham might deduct and retain for the said Charles Wright the amount of such last-mentioned sum or sums. The deed also contained a proviso that the judgment should be entered up as further security for the said annuity, and such payment as aforesaid in respect of any additional premium. And it was by the said indenture provided, that, after the decease of the plaintiff, or on repurchase of the said annuity, and full payment to the said Charles Wright, his executors, administrators, or assigns of the said annuity, and all arrears thereof up to the decease of the plaintiff, and all such last-mentioned payments, costs, charges, and expenses as aforesaid, that the said Charles Wright should enter satisfaction on the judgment, &c.; and it was agreed that in case the said C. B. Courtenay, C. Bolton, and the plaintiff, or either of them, should be minded

or desirous of repurchasing the said annuity or yearly sum of 105*l.* 17*s.* 6*d.*, and of such his or their intention should give three calendar months' notice in writing unto the said Charles Wright, his executors, administrators, or assigns, then and in such case he the said Charles Wright, his executors, administrators, or assigns, should and would, at the expiration of the said three calendar months for which such previous notice should be given as aforesaid, on receiving of and from the said C. B. Courtenay, C. Bolton, and plaintiff, or either of them, or the executors, administrators, or assigns of the said C. B. Courtenay, full payment of the said annuity or yearly sum of 105*l.* 17*s.* 6*d.*, and all arrear's thereof up to and including the day of repurchasing the same, together with a proportionate amount and part of the said annuity or yearly sum in case such repurchase should be made on any other day than one of the said quarterly days of payment, for the time being which should have elapsed from the last preceding quarterly day of payment up to and including the day of such repurchase, all and every such sum and sums of money (if any) which should be then due for or on account of any such payment or payments in respect of any additional premium or premiums as aforesaid, or any such costs, charges, or expenses, occasioned by the nonpayment thereof respectively, and take the sum of 999*l.* of lawful money of Great Britain in full, for the purchase of the said annuity or yearly sum of 105*l.* 17*s.* 6*d.*; and then the said Charles Wright, his executors, administrators, or assigns, and also that the said William Burnham, his executors, administrators, or assigns, should and would thereupon at the request, and at the proper cost and charges in the law, of the said C. B. Courtenay, C. Bolton, and the plaintiff, or either of them, or their assigns, release, assign, or otherwise dispose of the said annuity or yearly sum of 105*l.* 17*s.* 6*d.* and all securities for the same, unto the person or persons so

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redeeming the same, or unto the person or persons as he, she, or they, so redeeming the same, should in that behalf nominate, appoint, and acknowledge, or cause to be acknowledged, satisfaction on the record of the said judgment, and do any other act, deed, or thing necessary or advisable for the releasing, assigning, vacating, and discharging the said annuity or yearly sum of 105*l.* 17*s.* 6*d.* so to be repurchased, and the several securities given for securing the payment thereof as aforesaid, as by the person or persons so redeeming the said annuity, or his, her, or their counsel in the law, should be reasonably devised, advised, or required, so that for the doing thereof the said C. Wright and W. Burnham, or either of them, or either of their executors, administrators, or assigns, be not compelled or compellable to go or travel from their or either of their usual place or places of abode.

The following passage was added by amendment:—

The plaintiff subsequently attended at the office of her then solicitors, Messrs. Harvey and Wilson, who also acted as the solicitors of the said Charles Wright, for the purpose of executing the said indenture, when the said Mr. Harvey read the indenture aloud in the presence of the plaintiff and the said Charles Wright and the said Mr. Wilson. The plaintiff remarked that the return of the policy in the event of redemption of the annuity was not provided for by deed, whereupon the said Mr. Harvey informed the plaintiff that such a provision would invalidate the deed, and the said Charles Wright promised that no misunderstanding should arise on his part, as he clearly understood that the policy and any bonuses which might be declared thereon were to be the property of the plaintiff in the event of the redemption of the annuity.

Shortly after the execution of the deed, Charles Wright effected an insurance on the life of the plaintiff

with the Economic Insurance Company for 1000*l.*, at a premium of 35*l.* 17*s.* 6*d.*

The annuity was paid regularly until 1829, when, default being made, Charles Wright entered into possession of the rents and profits of the leasehold premises, and continued to receive them till his death.

C. B. Courtenay died on the 26th of March, 1838. In February, 1847, the plaintiff applied to the said Charles Wright to repurchase the annuity, when a correspondence took place, in the course of which, Wright having claimed the policy, nothing was done, and on the 11th of September, 1847, the plaintiff filed her original bill for redemption. In 1851 Charles Wright died, and the suit was revived against his executors on the 26th of December, 1859. The bill prayed for the usual redemption decree, and a declaration that, on paying what should be found due on the account and for premiums, that the plaintiff was entitled to an assignment of the securities, including the policy, and that on such payment the defendants might be decreed to assign the same.

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On behalf of the plaintiff, the following letter was tendered and objected to by the defendant :—

“In the year 1824, Dr. Courtenay was in embarrassed circumstances, and, to avoid law proceedings, which had been commenced, Mrs. Courtenay consented to raise 1000*l.*, by way of annuity, upon the property in question; for this purpose she consulted Messrs. Harvey and Wilson; the other partner in the firm, Mr. Wood, was unknown to her. In the interview with Mr. Harvey, he said he had a client who would advance the money immediately, but said Mrs. Courtenay, for the security offered, must go to some insurance office and ascertain if her life was insurable, she having only a life interest in the property. Mrs. Courtenay inquired whether she should go to any particular office, when the reply was,

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wherever she pleased, as she was to pay for the policy, and which would belong to her when the annuity was paid off; to secure the policy to her she must pay in all 10*l.* per cent. on the 1000*l.* The bonuses on the policy would belong to her as they became due, and might enable her to redeem the property at some other time. When the deeds were prepared and ready for signature, Mr. Harvey read the annuity deed in the presence of Mrs. Courtenay, Mr. Wright, the annuitant, and Mr. Wilson, when Mrs. Courtenay observed that the return of the policy, if she wished to pay off the annuity, was not named in the deed. Mr. Harvey and Mr. Wilson both replied that the deed had been prepared by Mr. Chitty, who had stated to them that the deed would be invalid with such a clause in it, but as all securities were to be returned as mentioned in the deed, and Mr. Wright, in fact, had no other security for the return of his loan, there could be no dispute on the subject whenever Mrs. Courtenay could pay the loan. Mr. Harvey then impressed this on the mind of Mr. Wright, who verbally and faithfully promised no misunderstanding on his part should arise, as both policy and the bonuses, he already understood, belonged to Mrs. Courtenay in the event of the return of the 1000*l.* The annuity deed was then stated to be for 999*l.*, to save some stamp duty, but Mr. Harvey called upon Mr. Wright to pay to Mrs. Wright 1*l.* to make up the 1000*l.*, which he did.

“ This was attested as follows :—

“ The above statement is perfectly true ; I was present at the time alluded to.

“ C. B. WILSON.

“ 4th September, 1855.”

The defendants, in their answer, denied that there was any contract as to the policy except what appeared on the deed, and alleged that the defendant, Charles Wright,

was to be at liberty, out of his own resources, to insure the life of the plaintiff, and that he did so accordingly.

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Argument.

Mr. *Bacon* and Mr. *H. Williams*, for the plaintiff.

This case does not come within the principle of the decision in the case of *Gotlieb v. Cranch*(a). That case was decided on the principle that, where the grantor of an annuity voluntarily insured the life of the grantee, and paid the premiums on the insurance, the policy, on redemption of the annuity, belonged to the grantee, and not to the grantor. Here the very thing which was wanting in *Gotlieb v. Cranch* to complete the title of the debtor, was supplied, because it was in evidence that, on the occasion of the treaty for the loan, there was a distinct stipulation that, in case of redemption, the policy should be the property of the grantor. But here the purpose of the insurance was made perfectly plain, as there was a covenant for payment of any sum which the grantee might prove to pay for additional premiums in case the plaintiff went abroad. If the policy were not a security for the debt, on what principle could the grantor be charged with the additional sums payable on her life? If, however, the policy was as on the true view of the transaction, it was submitted it was a security for the debt, it was within the contract to deliver up all securities on repurchase of the annuity. It was submitted that this at once distinguished the case from *Gotlieb v. Cranch*. [THE VICE-CHANCELLOR mentioned the cases of *Lea v. Hinton*(b), and *Drysdale v. Piggott*(c).] Those cases were so far favourable to the plaintiff that they narrowed the decision of *Gotlieb v. Cranch*, but it was submitted the plaintiff's case stood clear of that decision.

(a) 4 De G. M. & G. 440.

(b) 3 De G. M. & G. 823.

(c) 22 Beav. 238.

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Argument.

Mr. *Malins* and Mr. *T. Terrell*, for the defendants.

With regard to the alleged arrangement, it was not alleged in the original bill, but was added long after by amendment. It was submitted that the Court could not place any reliance on that part of the plaintiff's case.

It is settled by the decision in *Gotlieb v. Cranch* (a), that, where the grantee of an annuity, out of his own monies, voluntarily insures the life of the grantor, the policy and the bonus belong to the grantee—inasmuch as he is in such case entitled to retain the amount of the premiums, and become what is called his own insurer.

It might be that the amount of the annuity was calculated with a view to an insurance, but that circumstance, it may be conjectured, existed in *Gotlieb v. Cranch*.

The fallacy of the argument derived from cases where the insurance was effected to insure a debt, is, that in the case of an annuity the policy is not a security. In the case of *Drysdale v. Piggott* (b), the policy was given as a security for a debt, and the decision in *Lea v. Hinton* (c), proceeds on the same principle.

Mr. *Bacon*, in reply, contended that the evidence of the original arrangement was indisputable; therefore it was no objection that the allegation in the bill was added by amendment. It was true that, in *Lea v. Hinton* (c), and *Drysdale v. Piggott* (d), the policy was a security, but so it was here, and therefore the attempt to distinguish those cases from that now before the Court failed.

Phillip v. Eastwood (e) was also cited.

See *Ex parte Andrews*.

(a) 4 De G. M. & G. 440.

(b) 22 Beav. 238.

(c) 5 De G. M. & G. 823.

(d) 22 Beav. 238.

(e) Llo. & Goo. 296.

THE VICE-CHANCELLOR:—

This is a suit for the redemption of a life annuity, and the only question is as to the right of the defendant to retain for his own benefit, after the redemption, the policy of assurance on the life of the grantor of the annuity. The bill prays, that upon payment of what shall be found due for redemption, the defendants may be ordered to assign the annuity, securities, and policy of assurance to the plaintiff.

It appears that the payment of the annuity was secured on leasehold property, of which the plaintiff was tenant for life, and was also secured by warrant of attorney, to enter up judgment against the plaintiff and her husband and another person as surety. There is also a covenant in the usual form, that the plaintiff should appear at an insurance office, and provide proper vouchers, in order that Charles Wright (the grantee of the annuity), his executors, administrators, or assigns, if he or they should think fit, might insure her life for any sum not exceeding 100*l.*; and that she would not leave the kingdom without notice, and for the payment of any additional premium.

The proviso for redemption and repurchase binds the grantee, upon payment of the redemption money, to enter satisfaction on the judgment, and there is a covenant by the grantee to release, assign, and otherwise dispose of the annuity, and all securities for the same, to the person redeeming, and to do all acts necessary for “avoiding, releasing, assigning, vacating, and discharging the said annuity, &c., so to be repurchased, and the said several securities given for securing the repayment thereof as aforesaid.”

In the defendant's answer it is stated that there was no contract whatever as to the policy of assurance except what appears by the deeds; and that the grantee was to be at liberty, entirely at his own discretion, and out of

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his own resources, to insure the plaintiff's life if he thought fit, the plaintiff covenanting to do what was necessary to enable him to effect and preserve any policy on her life which he might think proper to effect.

For the plaintiff there is some evidence to prove an averment in the amended bill, purporting that, before the execution of the deed the plaintiff objected that there was no provision in the deed, that the policy of assurance would be delivered up on the redemption of the annuity, but that the plaintiff was then assured that the introduction of such a clause would invalidate the deed; but she was expressly assured and told that it was quite understood that the policy would be delivered up to her if she redeemed the annuity.

This part of the case has been materially weakened by the circumstance that the original bill, which was filed in the lifetime of the grantee, did not contain this averment, and it was introduced by amendment only after the death of the grantee.

The defendants (who are the executors of the grantee) rely on the authority of the case of *Gotlieb v. Cranch (a)*, as decided by the Lords Justices on appeal. In that case it was decided that the grantee of an annuity, who had insured the life of the grantor, was not bound to deliver up the policy of assurance to the grantor on the redemption of the annuity.

But there are two subsequent decisions of the Lords Justices, in cases where the right of a creditor to a policy of assurance effected voluntarily by him to secure his debt has been more fully considered.

In the case of *Lea v. Hinton (b)*, insurance by the creditor was entirely optional and not on any contract, and the premiums were in the first instance paid by the creditor out of his own monies. On the evidence of the trans-

(a) 4 De G. M. & G. 440.

(b) 5 De G. M. & G. 823.

action, it was considered by the Court, or rather presumed, that the insurance was effected as an indemnity to the creditors. One of the Lords Justices said, "The facts before the Court render inevitable the conclusion that Mr. Hinton effected it for the purpose of protecting and indemnifying himself as a surety or creditor, or as a surety and creditor of Mr. Lea, in whose life Mr. Hinton does not appear to have had an interest in any other sense. Nor can he be heard to say that he received the money which he did receive for any other purpose, denying, as he does, that he effected the policy on the account or for the benefit of Mr. Lea."

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Therefore, on the ground that substantially the policy of assurance was effected by the creditor to secure payment of the debt, the Court of Appeal held that the policy of assurance did not belong absolutely to the creditor, and that he was not entitled to it and also to the payment of his debt, he having charged the debtor in account with the expense and premiums of assurance. In that case, the expenses and premiums of assurance were paid primarily by the creditor out of his own monies, and there was a voluntary application of his own monies for his own benefit.

In the case of *Drysdale v. Piggott*(a), where the creditor effected an insurance in his own name, and had paid all the premiums except the first out of his own monies, and the debtor on being applied to expressly refused to pay the premiums, and was not bound by any covenant or legal obligations to pay them, the Master of the Rolls held that the debtor, by refusing to pay the premiums, had abandoned and lost all right to the policy. But this decision was reversed by the Lords Justices.

In each of these cases the payment of the premium by the creditor was optional, and was made primarily

(a) 22 Beav. 238.

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with his own monies—paid for a purpose primarily beneficial to himself. Nevertheless, as the nature of the transaction showed that the substantial purpose of effecting the policy was to secure the debt, the Court of Appeal held that when the creditor was paid the policy of assurance was to be given up to the debtor.

In the present case, Mr. Malins, on behalf of the defendants, pressed by these decisions of the Court of Appeal, has endeavoured to distinguish them as cases between debtor and creditor, and not applicable to the case of a policy of assurance effected by the grantee of an annuity. But it seems impossible to say that the relation of debtor and creditor does not subsist between the grantor and grantee of a life annuity. The grantee is a creditor of the grantor on the covenant for payment of the annuity, and on the judgment entered up under the warrant of attorney for the money advanced to purchase the annuity. In what respect does the redemption of an annuity differ from the payment of a debt? The transaction on the redemption of an annuity is a payment and extinction by the grantor of the debt which he owes on the covenant to pay the annuity, and also of the debt which he owes on the judgment for the amount of the redemption-money. It is impossible to disconnect the policy of assurance from the debts due on the judgment and the covenant. The money sufficient to enable the grantee, if he chose, to effect the policy, was included in the debt on the covenant.

The argument that the grantee was not bound to apply towards the insurance the proportion of the annuity which was fixed with a view to that purpose—and that therefore the insurance being entirely in the option of the grantee, it must be considered as paid for out of his own monies—should have greater force in such cases as *Lea v. Hinton* and *Drysdale v. Piggott*. In these cases the insurance was entirely optional, and the creditor was not,

as in the case of the annuity, supplied beforehand with money from the debtor sufficient to defray the continuing expenses and premiums on the assurance.

Indeed, the right of the grantor to have the policy of assurance delivered up as one of the securities for the debt obtained at his expense, seems much stronger when due consideration is given to the effect of the covenant for payment of the additional premium on going abroad. There is nothing optional in that obligation. It provides absolutely and imperatively that the grantor shall pay the sum necessary to keep the policy in force. Such a stipulation places the right of the grantor of the annuity, when he comes to pay and extinguish the debt, much higher than the right of the debtor in the cases of *Lea v. Hinton* and *Drysdale v. Piggott*.

It therefore seems to me that I am bound to follow the doctrine established by those two cases, the most recent, and, apparently, the most matured decisions of the Court of Appeal.

The principle to be extracted from these two cases seems to be this :—

Where the relation of debtor and creditor subsists, and the true construction of the instruments and the evidence of the real nature of the transaction shows that the policy of the assurance was effected by the creditor as a security or indemnity, if the debtor directly or indirectly provides money to defray the expense of that security, he is, on a principle of natural equity, entitled to have the security delivered up to him when he pays his debt, which it was directly or indirectly at his expense effected to secure. This is an application of the maxim, “*Qui sentit onus sentire debet et commodum.*” The same principle is recognised by the civil law, as appears by the following passage in the Digest (50, 17, 10):—“*Secundum naturam est, comoda cujusque rei eum sequi quem sequuntur incommoda.*”

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It is incontrovertibly established in this case that, on the face of the instruments, it was contemplated that the grantee of this annuity should have the means of effecting this policy of assurance, and that he stipulated for payment by the grantor of a sum sufficient to effect it; that he bound the grantor by covenant to pay money which might become necessary to keep the policy in force; that the purpose of effecting the policy was to indemnify and secure to the grantee the money which he advanced to the grantor; that the repayment on redemption of the money so advanced by the grantee is a payment and satisfaction of every debt and obligation by the grantor to the grantee, for the security of which the policy of assurance was effected.

It follows that where the grantor makes this full repayment he is entitled to have that security delivered up which has been effected substantially at his expense, because he was made to pay a sum calculated as an equivalent to the expense of obtaining the security.

If there were any doubt as to the right of the plaintiff, the language of the deed seems to put it beyond all question. The words of the covenant which bind the grantee as to the securities which he is to deliver up on redemption are these:—"The said several securities given for securing the repayment thereof as aforesaid." It seems to be impossible, on any true construction of the deed, to say that the policy of assurance which the deed contemplates, if the grantee chose to effect it, is not a security for repayment within the words of this covenant.

It appears, therefore, that the case of the plaintiff is established, and that there must be a decree for the delivery up to her of the policy of assurance. As this is the only question in the cause, the plaintiff is entitled to the costs of the suit, but must pay all other costs usual on redemption.

OGILVIE v. JEAFFRESON.

THIS bill was filed by James Ogilvie, and prayed as follows:—

1. That the four several indentures, purporting to be leases, dated respectively the 28th day of April, 1856, may be set aside and declared to be void as against the plaintiff, and may be decreed to be delivered up to be cancelled.

2. That the plaintiff may be declared to be entitled to the full benefit of the mortgage security of the 13th day of December, 1852, and to the possession of the said premises by virtue thereof, notwithstanding the said four indentures, as against the several defendants hereto.

The plaintiff was the mortgagee of four leasehold houses, numbered 9, 10, 20, and 21, and situated in Highbury Grove Lane, Islington, from David Hughes, under the following circumstances:—David Hughes, the plaintiff's solicitor, by four several indentures of lease, dated the 17th of June, 1848, demised the four leasehold houses in question to Elizabeth Thomas, for the term of ninety-nine years, from the 29th day of September, 1844, at the rents of 30*l.*, 30*l.*, 30*l.*, and 29*l.*, respectively, subject to certain covenants therein contained.

By an indenture of mortgage, bearing date 6th of March, 1849, between Elizabeth Thomas of the one part, and William Potell of the other part, and by an indenture of transfer, bearing date 24th of June, 1852, between William Potell of the one part, and Ebenezer Hunt of the other part, the piece of ground, the messuage and premises, being No. 9, Highbury Grove Lane, became vested in Ebenezer Hunt for all the residue of the said

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3rd, and
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The plaintiff, a mortgagee of leasehold premises, was induced by the mortgagor (his solicitor) to execute certain deeds, represented as being leases, but by which, in consideration of a sum, never in fact paid, the plaintiff was made to assign the premises, by way of sale, to a female servant, by whom they were afterwards mortgaged for value to the defendants. On a bill by the first mortgagee to set aside these deeds, the Court held that they were wholly void, and decreed them to be delivered up to be cancelled.

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term of ninety-eight years less three days, subject to redemption on repayment of 500*l.* and interest.

By another indenture of mortgage, bearing date the 8th of December, 1851, between Elizabeth Thomas of the one part, and Richard Bendy of the other part, the premises being No. 10, Highbury Grove Lane, were demised by the said Elizabeth Thomas to Richard Bendy for all the residue of the said term of ninety-eight years, less one day, subject to redemption on repayment of 700*l.* and interest.

By another indenture of mortgage, bearing date the 13th of September, 1848, between Elizabeth Thomas of the one part, and Lydia Amelia Curling of the other part, the messuage and premises comprised in the thirdly before-mentioned indenture of lease, being No. 20, Highbury Grove Lane, were demised by Elizabeth Thomas to Lydia Amelia Curling for all the residue of the said term of ninety-eight years, except the last day of the said term, subject to redemption on repayment of 500*l.* and interest; and by another indenture of mortgage, dated the 7th of November, 1848, between the said Elizabeth Thomas of the one part, and John Russell Law of the other part, the said last-mentioned premises were demised to John Russell Law for the residue of the said term of ninety-eight years, except the last day, subject to the mortgage to Lydia Amelia Curling, and subject also to redemption on repayment of 300*l.* and interest.

By another indenture of mortgage, bearing date the 1st of March, 1850, between Elizabeth Thomas of the one part, and Henry Roake and Henry Titheradge of the other part, the said messuage premises, being the house No. 21, Highbury Grove Lane, were demised by the said Elizabeth Thomas to Henry Roake and Henry Titheradge, for the residue of the said term of ninety-

eight years, except the last day of the said term, subject to redemption on repayment of 750*l.* and interest.

By an indenture of the 31st of December, 1851, and made between Elizabeth Thomas of the first part, William Overton of the second part, and the said David Hughes of the third part, the said premises contained in and demised by the said four several hereinbefore-mentioned indentures of lease were, with other property, assigned to and became vested in the said David Hughes for the residue then unexpired of the said several terms granted by the said leases respectively, and subject to the said several mortgages.

By an indenture of transfer, bearing date the 13th of December, 1852, and made between Ebenezer Hunt, of the first part; Richard Bendy, of the second part; Lydia Amelia Curling, of the third part; John Russell Law, of the fourth part; Henry Roake and Henry Titheradge, of the fifth part; David Hughes, of the sixth part; and the plaintiff, James Ogilvie, of the seventh part: after reciting, *inter alia*, that all interest on the said several mortgages up to the day of the said indenture had been paid, and that the said David Hughes had paid to the said Richard Bendy 200*l.*, and to Ebenezer Hunt 50*l.*, in part payment of the said principal monies secured by the said indentures, &c.: and reciting that there was due to the said Ebenezer Hunt, 450*l.*; to Richard Bendy, 500*l.*; to Lydia Amelia Curling, 500*l.*; to John Russell Law, 300*l.*; and to the said Henry Roake and Henry Titheradge, 750*l.*: it was witnessed, that, in consideration of the said several sums paid to the several parties, they, the said parties thereto, did assign and transfer to the plaintiff, his executors, administrators, and assigns, the said several principal sums so due and owing to them respectively, and all interest to grow thereon, to hold the same, &c. And it was further witnessed, that, for the consideration aforesaid, they, the said parties, did assign,

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and he, the said David Hughes, did grant and confirm unto the plaintiff, &c., the said several messuages and tenements, &c., being Nos. 9, 10, 20, and 21, Highbury Grove Lane aforesaid, and all and singular the other premises comprised in and demised by or held under the said four several indentures of lease, together with the said leases, and all mesne assignments, and underleases and mortgages thereof—to hold the same unto the plaintiff, for the then expired residues of the said several terms granted by the said indentures of mortgage respectively, freed from the provisos for redemption reserved by such indentures of mortgage respectively, but subject to a proviso in the now stating indenture contained, for redemption of the said premises on payment by the said David Hughes unto the plaintiff of 2500*l.* upon the 30th day of December, 1855, and interest thereon in the mean time at 5*l.* per cent.

The principal monies were not paid at the date fixed, but the interest was paid, and the plaintiff continued the mortgagee of the premises, the equity of redemption being vested in David Hughes. On the 21st of April, 1856, the plaintiff received from David Hughes, his solicitor, the following letter:—

“ 13, Gresham Street, 21st April, 1856.

“ Dear Sir,—When you pass this way, I will thank you to call here to sign leases of the four houses at Highbury, which you have on mortgage for the 2500*l.*, as I think it a good time to put up this property for sale. You will have ample notice before you are paid off, or a new security found for the money.

“ Yours faithfully,

“ DAVID HUGHES.

“ James Ogilvie, Esq.,

“ 1, Woburn Place.”

David Hughes was a solicitor, and at the date of the transactions in question was carrying on business at 13, Gresham Street, in the city of London, and had acted as the plaintiff's solicitor in the matter of the said mortgage of the 13th of December, 1852.

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The 14th and 15th paragraphs of the bill were as follows:—

“ 14. The plaintiff, in pursuance of the request contained in the said letter of the 21st day of April, 1856, called at the office of the said David Hughes, in Gresham Street aforesaid, on the 28th day of the same month, and on that occasion the said David Hughes placed before the plaintiff for execution four parchment writings, which he represented to be, and which the plaintiff understood to be, leases of the property at Highbury Grove Lane, on mortgage to the plaintiff as aforesaid, and to be leases of the same, at rack rent; and the said David Hughes represented to the plaintiff on the same occasion that such leases were being granted in order to effect a more favourable sale of the said houses. The plaintiff, being a mortgagee only of the said leases, and having implicit confidence in the said David Hughes, and in the truth of his aforesaid statement, thereupon executed the said parchment writings so placed before him as aforesaid, without examining the terms of the same or the contents thereof; and the plaintiff, in so executing the same, believed and supposed, that he was executing leases of the said four houses in Highbury Grove Lane, at rack rent, to persons approved of as lessees by the said David Hughes, the solicitor of the plaintiff and the owner of the equity of the redemption of the said premises, but the plaintiff did not know who the lessees were.

“ 15. The said several deeds, when executed, remained in the office of the said David Hughes, and the plaintiff thenceforth continued to receive, as he previously had done, the interest which became payable upon his said

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mortgage security; and, under such circumstances, he had no occasion to take, and did not take, possession of the said mortgaged premises."

The deeds, when executed, remained in the office of Hughes, who paid the interest to the plaintiff, who therefore did not think it necessary to take possession of the premises.

In August, 1858, David Hughes absconded, indebted to a large amount to several persons, and was subsequently convicted of fraudulent bankruptcy. This circumstance led to an examination of the transactions with which he had been connected, and the plaintiff ascertained that the four deeds which he had executed on the 28th of April, and which Hughes had represented as being leases of the four houses at a rack rent, were, in fact, assignments of his whole interest in the mortgaged property, without any consideration whatever, and without any reservation of rents, except 30*l.*, as to Nos. 9, 10, and 20, and 29*l.* as to No. 21, all in Highbury Grove Lane aforesaid, which were the same in amount respectively with the rents already reserved under the leases, which had been mortgaged to the plaintiff.

The plaintiff further discovered, that one of the four indentures which Hughes induced him to execute was between the plaintiff, of the first part; David Hughes, of the second part; and Catherine Jones, a nursemaid in Hughes's family, and who subsequently married the defendant Charles Chappel, of the third part. It was by the said indenture witnessed, that, as well in consideration of 1000*l.* which Catherine Jones had paid to David Hughes, with the consent of the plaintiff, as the purchase-money for the premises therein demised, as of the yearly rent and covenant therein reserved and contained on the part of Catherine Jones, her executors, administrators, and assigns, to be paid, observed, and performed, the plaintiff demised and leased, and David Hughes demised,

leased, ratified, and confirmed unto Catherine Jones, her executors, the messuage, &c., No. 10, Highbury Grove Lane, to hold the same unto the said Catherine Jones, as from the 29th day of September then last past, for the term of eighty-six years (subject to a certain underlease, dated the 24th of June, 1854, to J. D. Lee), at the yearly rent of 30*l.*, payable quarterly. By the said indenture, a covenant was expressed to be entered into by the plaintiff with Catherine Jones, that the plaintiff, during the continuance of the term thereby granted, would pay the rent reserved by the said indenture of lease under which the premises were held, at the times therein appointed for the payment thereof, and perform the covenants and agreements in the said indenture contained. The other three deeds were in the same form, except as to the amount of rent of No. 21, Highbury Grove Lane.

It appeared from the evidence, that, by an indenture, dated the 24th of December, 1856, between Catherine Jones, described as of No. 10, Canonbury Place, Islington (Hughes's residence), of the first part; David Hughes, of the second part; the defendant W. T. Neve, of the third part; after reciting the two several indentures of the 28th day of April, relating to the houses, Nos. 9 and 10, Highbury Grove Lane, and reciting that the defendant William Tanner Neve, at the request of David Hughes, had agreed to lend Catherine Jones 1300*l.*, on having the repayment thereof with interest, secured as hereinafter expressed, and further secured by the covenant of the said David Hughes hereinafter contained, it was expressed to be witnessed, that, in consideration of the sum of 1300*l.* that day paid by the defendant W. T. Neve, at the request of the said David Hughes, to the said Catherine Jones, she, the said Catherine Jones, did demise unto the defendant W. T. Neve, his executors, administrators, and assigns, the said messuages and pre-

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mises, Nos. 9 and 10, Highbury Grove Lane aforesaid, comprised in two of the said indentures of the 28th of April, 1856, respectively, to hold the same for the then unexpired residue of the said several terms of eighty-six years respectively created by the said last-mentioned indentures of lease, except the last ten days of each of the said terms, subject, nevertheless, to a proviso for the reassignment or surrender of the said premises to Catherine Jones, on her paying the defendant, W. T. Neve, on the 25th day of March, 1860, 1300*l.* with interest at 6 per cent. And Catherine Jones and David Hughes did thereby jointly and severally covenant with the defendant W. T. Neve, that they would pay the sum of 1300*l.* with interest at 6 per cent., on the 25th day of March, 1860.

On the 1st of September, 1857, Catherine Jones mortgaged No. 20, Highbury Grove Lane, to Lydia Amelia Curling, to secure 400*l.* thereon, who died almost immediately afterwards, having by her will appointed the defendants Croft and Baker her executors, who duly proved her will.

On the 1st of December, 1857, Catherine Jones mortgaged No. 21, Highbury Grove Lane, to the defendant Jeaffreson, to secure 650*l.* and interest.

By an indenture, dated the 21st of April, 1858, between Catherine Jones of the one part, and David Hughes of the other part, after reciting that the said Catherine Jones was only a trustee for the said David Hughes of the several leases granted to her; and also reciting that the consideration monies for the same had not in fact been paid by Catherine Jones, and that the monies advanced on the said mortgage securities had been received by the said David Hughes: it was witnessed, that she, the said Catherine Jones, did thereby assign unto the said David Hughes (among other things) the said premises demised to her by the said four indentures of lease of the

28th of April, 1856, to hold the same to the said David Hughes for the then unexpired residue of the several terms for which the same were respectively demised, to Catherine Jones, freed and discharged from all claims, &c., but subject to the incumbrances then affecting the same respectively.

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The bill charged that the said four deeds purporting to be leases, and dated respectively the 28th of April, 1856, were fraudulently obtained from the plaintiff by David Hughes, and ought to be delivered up to be cancelled.

The plaintiff charged that each of the mortgagees W. T. Neve, L. A. Curling, and J. F. Jeaffreson had notice of the invalidity of the said four deeds purporting to be leases, at the times when they respectively took mortgages of the said leases; and that the deeds were void as well against them and their respective mortgagees as against the assignees of Hughes.

The plaintiff charged that the defendant W. T. Neve, never agreed to lend the said Catherine Jones, otherwise Chappel, 1300*l.* or any other sum, and that he knew that the premises comprised in his alleged mortgage did not belong to Catherine Jones, but were dealt with by David Hughes as his own, though, in the deed executed by the plaintiff, she purported to be the lessee.

The plaintiff charged that the defendant W. T. Neve was bound to have known, and did know, who Catherine Jones was; that he was bound to know the contents of the said two leases recited in his mortgage; and that Catherine Jones could not have and had not paid the consideration monies mentioned therein; and that the same consequently were invalid as against the plaintiff.

That if the said W. T. Neve had communicated with the said Catherine Jones, as he ought to have done, he would have ascertained that she had no interest in the said lease, and had not paid the consideration monies,

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and that the said leases were secretly made for David Hughes's benefit, and were a fraud on the plaintiff.

The plaintiff charged that the defendant, W. T. Neve, had notice by his mortgage deed and by the contents of the leases therein recited of the 17th of June, 1848, under which Nos. 9 and 10, Highbury Grove Lane, were held; and of the facts that the rents reserved by such leases were 30*l.* per annum each, which were the same in amount as the rents reserved by the said leases obtained from the plaintiff as aforesaid, of the same houses; and the plaintiff charged, that, having notice of these facts and of the terms of the said leases to the said Catherine Jones, the defendant W. T. Neve knew, or must be taken to have known, that by the said leases to the said Catherine Jones, the plaintiff was, in effect, made to part with his whole interest in the said premises, Nos. 9 and 10, Highbury Grove Lane, without any consideration, either of money in gross, or by way of rent, and that the plaintiff's security was thereby rendered valueless, and that therefore the said leases appeared, on the face of them, to have been improperly obtained from the plaintiff.

The plaintiff further charged, that the defendant Neve made no inquiry of the plaintiff at any time concerning the validity of the said leases to the said Catherine Jones, or concerning the nature of the plaintiff's interest, but that, nevertheless, he was bound to make such inquiry, and if he had he would have ascertained how the said leases were obtained.

The plaintiff charged, that, on this ground also, the defendant Neve was affected with notice of the invalidity of the said leases as against the plaintiff.

As regarded the defendants Curling and Jeaffreson, the plaintiff charged that Catherine Jones never applied to them, or either of them, for any loan of money, and that neither of them ever advanced any money to Catherine Jones; and that such defendants knew that the

property comprised in their mortgages did not belong to Catherine Jones, but were, notwithstanding that she purported to be the lessee under the deeds executed by the plaintiff, dealt with by Hughes as his own.

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The plaintiff further charged, that Hughes was the solicitor of Miss Curling and the defendant Jeaffreson in the mortgage transaction relating to Nos. 20 and 21, Highbury Grove Lane aforesaid, and that they respectively had notice of the several matters showing the invalidity of the leases of the said premises.

The plaintiff further charged that Miss Curling and the defendant Jeaffreson were bound to know, and must be taken to have known, who and what Catherine Jones was, and the contents of the leases recited in these mortgages, and were bound to know that Catherine Jones could not and had not paid the consideration monies therein mentioned, and that the same consequently were invalid as against the plaintiff.

That if the said Curling and Jeaffreson had communicated with the said Catherine Jones, as they ought to have done, they would have been informed that she had no interest in the said leases of Nos. 20 and 21, Highbury Grove Lane, and would have known that Catherine Jones had not paid the consideration monies mentioned therein, and that the said leases, being secretly made for the benefit of Hughes only, were a fraud upon the plaintiff, or at least invalid against him.

The plaintiff further charged that Curling and Jeaffreson had notice by their mortgage deeds and the contents of the leases therein recited of the two leases of the 19th day of June, 1848, under which the messuages Nos. 20 and 21, Highbury Grove Lane, were held, and of the fact that the rents reserved by such leases were 30*l.* and 29*l.* per annum each, which were the same in amount as the rents reserved by the said leases obtained from the plaintiff as aforesaid of the same houses; and

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the plaintiff charged that, having notice of these facts and of the terms of the said leases to the said Catherine Jones, the said Curling and Jeaffreson knew, or must be taken to have known, that by the said leases to Catherine Jones, the plaintiff was, in effect, made to part with his whole interest in the premises, Nos. 20 and 21, Highbury Grove Lane, without any consideration, either of money in gross or by way of rent; that the plaintiff's security was thereby rendered valueless; and that, therefore, the said leases appeared on the face of them to have been improperly obtained from the plaintiff.

The plaintiff further charged, that Curling and Jeaffreson made no inquiry of the plaintiff at any time concerning the validity of the said leases to Catherine Jones, concerning the nature of the plaintiff's interest, but that, nevertheless, they were respectively bound to make such an inquiry; and if they respectively had made such inquiry, they would have respectively discovered how the said leases were obtained. And the plaintiff charged that Curling and Jeaffreson were respectively, on this ground, also affected with notice of the invalidity of the said leases as against the plaintiff.

Subsequently to the filing of the original bill, the defendant Catherine Jones had intermarried with Charles Chappel; who were both made defendants by amendment, in consequence of an objection taken by the Court.

By his affidavit, the plaintiff deposed that when he called at Hughes's office on the 28th of April, 1856, on that occasion Hughes placed before him for execution four parchment writings, which he represented to be leases of the property at Highbury Grove Lane, on mortgage to plaintiff as aforesaid, and which plaintiff understood to be leases of the same at rack rent; and Hughes represented to plaintiff on the same occasion that such leases were being granted in order to effect a more favourable sale of the houses.

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In cross-examination, the plaintiff said he could not exactly say what Hughes said to him; but to the best of his belief he said that signing the document was "for the improvement of the property." Nothing was said whatever as to the persons to whom the leases were to be granted. Plaintiff signed them without any hesitation. Nothing was said about the rent; indeed nothing further was said at all, and then plaintiff left the office. He felt no curiosity as to what the rents were. Plaintiff did not think of asking Hughes what the amounts of the rents were, nor the terms of the leases, nor whether the lessees were respectable people.

The defendant J. F. Jeaffreson, by his answer, said that up to the 29th of July, 1858, when a notice appeared on the door of Hughes's office desiring that all letters and messages should be taken to Messrs. Blake & Snow, solicitors, 22, College Hill, Cannon Street, in whose favour he was thereby stated to have relinquished business, he (the defendant) had the fullest confidence in Hughes, and never employed any other solicitor. It was not till after that date that he remembered to have noticed the name of Catherine Jones on any of his title-deeds; but if he did, he had no reason to suspect that it was the name of a trustee for Hughes, and he never before knew that Hughes had a servant named Catherine Jones. Defendant said, that, early in the year 1855, Huges told him that he knew of a security for 650*l.* which he could recommend; and defendant having such confidence and reliance in Hughes as aforesaid, did, on or about the 20th of March, 1855, draw a cheque for the sum of 650*l.* upon his bankers, and send the same to Hughes, in order that the same might be invested.

He claimed to hold the house No. 21 as a security for the sum of 650*l.* and interest; he denied that he had any notice, constructively or in any way, of the alleged invalidity of the deeds purporting to be leases; he

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admitted that he made no inquiry of the plaintiff respecting their validity, and submitted that the bill should be dismissed against him with costs.

The defendant Neve, by his answer, said he asked Hughes what interest Mr. Ogilvie had in the premises, and was told that he was a mortgagee.

Catherine Chappel deposed, that, before she was married, she lived at Hughes's residence, 10, Canonbury Place, as nursemaid to his family, and that from time to time she signed many deeds and documents by his direction, and on the representation that they were merely matters of form, and that she had no idea she was doing anything wrong. She had no particular recollection of signing any of the deeds in question, but had no reason to doubt that she did so. She said she "never had any interest in the said houses, or any or either of them," nor did she know she was made a party to the deeds until the plaintiff's solicitor told her. She further said that the defendant J. F. Jeaffreson knew that 10, Canonbury Place (as of which place she was described), was Hughes's residence, and that he was the medical attendant of Hughes's family.

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Mr. *W. D. Lewis* for the plaintiff.

The bill prays that the deeds which the plaintiff was induced to execute by reason of the fraud of Hughes, may be delivered up to be cancelled; and this relief would be a matter of course, unless the defendants can show that they have acquired a legal right under such instruments, and which they are entitled to enforce against the plaintiff.

They claim to be purchasers for value without notice, but their first difficulty is to show that they are purchasers at all. The alleged vendor, Catherine Jones, had nothing in her to assign; she held a fictitious lease; but, if so, the assignment of such lease, or a new demise

by her, could pass no interest. The defendants admit that they paid their money to Hughes, and not to Catherine Jones.

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The first branch of the plaintiff's case was irrespective of notice altogether. The plaintiff executed the deeds of the 28th of April in the belief and with the mind that he was executing leases; but they were not leases at all but sales, on which the consideration never was paid, and therefore passed no legal interest. At law, to an action on these instruments, the plaintiff might plead in answer either fraud or *non est factum*, i. e. that that instrument was not his deed, the consenting mind being wanting in the execution. This part of the case is clear of all question of notice.

In *Vorley v. Cooke*, where a client, who was induced to execute instead of a deed of covenant to produce (a), a deed of mortgage, which was afterwards deposited with a third party for value without notice, was held wholly void, and decreed to be delivered up to be cancelled. It was impossible to distinguish that case from the present one.

But, secondly, it was submitted that the defendants were affected with notice of the infirmity of the vendor's title.

The plaintiff covenanted with Catherine Jones for quiet enjoyment, and to pay rent and perform the covenants in the superior lease, but the defendant therefore had notice that Ogilvie, who had received no part of the consideration, was under onerous covenants. This was notice sufficient to put the parties on inquiry.

The defendants claimed under deeds which they alleged to be mortgages, but which were inconsistent with the facts on which they now rely. Neve's mortgage of the 24th of December recited that Neve had agreed to lend Catherine Jones the monies therein mentioned, but that

(a) *Ante*, Vol. I, p. 230.

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was admitted now to be a mere fiction. There was in fact in the deed a joint and several covenant by Catherine Jones and Hughes for repayment at Lady Day, 1860. To the other mortgage deeds Hughes was not a party at all. Catherine Jones admitted she signed the deed in ignorance, at the request of Hughes, and the deed of April, 1858, stated she was a trustee for Hughes.

Neither at law nor in equity did any interest pass to Catherine Jones, and she could therefore pass none. But, even if a legal interest had been vested in her, she must, under the circumstances of the case, be regarded as a trustee for the plaintiff, and all other persons deriving any interest through her must take it subject to the trust.

The defendants were in this difficulty: they could not prove payment of the consideration to Catherine Jones, or for her benefit, and the moment they showed payment to some other person their title was gone.

A trustee cannot pass the legal estate without notice to a purchaser for valuable consideration, because the knowledge of the trustee must affect his assignee. If the assignment affected the conscience of the assignor, it affects also the conscience of the assignee. [*Carter v. Carter (a)*, *Bates v. Johnson (b)*, were cited.]

The deeds gave notice—first, that the plaintiff was a mortgagee; secondly, that, being mortgagee, he held the property at a mere ground rent; thirdly, that the rent was small, and that the plaintiff had parted with his interest without consideration.

The purchaser is bound to know from whom the legal title is derived: *Penny v. Watts (c)*, *Jones v. Smith (d)*, *Beames on Pleas (e)*.

One contracting party is bound to know who the

(a) 3 K. & J. 617.

(b) 1 Johnst. 316.

(c) 1 M. & G. 150, 167.

(d) 1 Hare, 43.

(e) Page 237.

other. Therefore the defendants must be assumed to know that Catherine Jones was a servant in Hughes's house.

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The defendants Jeaffreson and the representatives of A. Curling were in a rather worse position than Neve, for Hughes was their solicitor, and though they must not be taken to know the fraud, it was otherwise as to the facts, and this was sufficient to put them on inquiry. [*Kennedy v. Green*(a), and *Espin v. Pemberton*(b), were cited.]

Mr. *Greene* on the same side.

There could be no doubt that this Court had jurisdiction to deal with these leases, though in the defendants' hands.

The question must be regarded in two aspects:—first, whether the whole transaction, being a fiction, conferred any title on the defendants either at law or in equity; and secondly, assuming some interest to have passed, whether the defendants did not acquire that interest with actual or implied notice of the circumstances under which the plaintiff was induced to execute the deed of sale; and, if so, whether they did not take whatever interest these deeds give them, subject to the plaintiff's claim.

That the whole transaction was a fraud on the part of Hughes, and that the plaintiff was induced to execute a deed of one kind believing it to be of another, was proved; but if so, even at law no interest passed.

Secondly. It was submitted that Catherine Jones was a trustee for the plaintiff, only as she never intended to buy, any more than Hughes ever intended to sell, therefore there was a resulting trust for the plaintiff.

Thirdly. The defendants were not purchasers for value

(a) 3 M. & K. 718.

(b) 43 Drew. 33.

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without notice, the only character in which they could defend this suit, because, first, the admitted facts were inconsistent with their being purchasers at all; and further, the deeds themselves gave notice that the plaintiff was a mortgagee; that, by virtue of the deeds of April, 1856, he was made to part with his beneficial interest, and had entered into covenants; and lastly, that Catherine Jones was described as a resident in Hughes's house. [*Lambert v. Atkins*(a), *Chitty on Pleadings*(b), *Wallwyn v. Lee*(c), *Jackson v. Rowe*(d), *Mitford on Pleadings*(e), were cited.]

Mr. *Eddis* was heard on the same side.

Mr. *Bacon* was engaged before the Court of Appeal, and was not heard.

Mr. *Giffard* and Mr. *Wintle* for Jeaffreson.

The object of this bill was to have the defendants' lease delivered up to be cancelled, but this was inconsistent with the settled principle on which the Court deals with purchasers for valuable consideration without notice.

The plaintiff's case is, that he was asked to execute a lease, but the deeds actually executed were leases. He does not pretend to say that he made any inquiry or was asked to execute leases at a rack-rent. He says he understood they were, though he does not say Hughes told him so. He was asked to execute leases, and he did so; but how then could he plead *non est factum*, that is, that he had not the mind to execute? This disposes of the first part of the case, because the deeds were clearly valid at law, and the legal interest was transmitted to Jeaffreson. The parchments which Mr. Jeaffreson held might be

(a) 2 Camp. N. P. 273.

(b) 5th ed. 519.

(c) 9 Ves. 24—32.

(d) 2 S. & S. 472; s. c. 4 Russ.

514.

(e) 5th ed. 319.

worthless in a court of law, but on what principle was a court of equity to take them from him? He had paid his money for them without notice, and whatever might be their value, this Court would not interfere against a purchaser for value without notice: *Bowen v. Evans*(a). In *Dawson v. Prince*(b), Lord Justice Turner said, "Upon principle and authority, I take it to be perfectly settled, that, as against a purchaser for valuable consideration without notice, having a legal title, this Court would give no relief." This was where the purchaser had a legal title; but in *Joyce v. De Moleyns*(c), it was held, that, where a purchaser for value obtains possession of deeds *bonâ fide*, and without notice, this Court would not decree them to be delivered up, even though he could not maintain his title to the estate. This doctrine was approved of by Lord St. Leonards(d). In that case the deeds were stolen, but it was held that the Court would not interfere against a purchaser for value and without notice. The distinction lay between the innocent and the guilty parties; as against the guilty party this Court would interfere, but against a purchaser for value without notice, the power of the Court was paralysed. In *Jones v. Powles*(e), Sir John Leach said, "his impression at the opening of the case was, that the protection of the legal estate extended only to cases where the title of the purchaser for valuable consideration without notice was impeached by reason of some secret act or matter done by the vendor, or those under whom he claimed; but, upon full consideration of all the authorities referred to, and the dicta of judges and text writers, and the principles upon which the rule was grounded, he was of opinion that the protection of

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(a) 1 J. & L. 178—263-4.

(b) 2 De G. & J. 49.

(c) 2 J. & L. 374.

(d) Vend. & Pur. 13th ed. 608.

(e) 3 M. & K. 581—596.

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the legal estate was to be extended, not merely to cases in which the title of the purchaser for valuable consideration without notice was impeachable by reason of a secret act alone, but also to cases in which it was impeached by reason of the falsehood of a fact of the title asserted by the vendor or those under whom he claimed, where such asserted title was clothed with possession, and the falsehood of the fact asserted could not have been detected by reasonable diligence." In *Rice v. Rice*(a), the vendor executed a conveyance of certain land, and signed the receipt indorsed, and, without having received the purchase-money, delivered the deed to the purchaser, who deposited it by way of equitable mortgage and afterwards absconded, but it was held that the title of the mortgagee was preferable to the vendor's lien for unpaid purchase-money.

In *Hiorns v. Holtom*(b), a man executed a deed of mortgage to A. The deed, though executed, was not acted upon, but remained in the hands of the solicitor. The mortgagor afterwards executed a second deed of mortgage to A. for 2000*l.*, but A. being fraudulently induced by the solicitor to sign an agreement to transfer the mortgage to B., who, on the faith of such agreement, made advances to the solicitor—on a bill filed, it was held, that A. must be postponed to B. Here, the plaintiff, having improvidently executed the deed, allowed Hughes to make a fraudulent use of the deed so executed; that the legal estate did not pass was immaterial(c). Assuming the equities of the plaintiff and defendant to be equal, this Court would not interfere to deprive the defendant of the legal advantage he had gained: *Perry Herrick v. Atwood*(d). It was submitted, that the bill must be dismissed with costs.

(a) 2 Drew. 73.

(b) 16 Beav. 259.

(c) Ibid.

(d) 25 Beav. 205—213; s. c.

2 De G. & J. 21.

[*Kennedy v. Green*(a), *Ex parte Knott*(b), *Evans v. Bicknell*(c), *Mitford on Pleadings*(d), *Attorney-General v. Wilkins*(e), *Greenlade v. Dare*(f), *Seybourne v. Clifton*(g), 1 *Eq. Cas. Abr.*(h), were cited.]

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Mr. *Malins* and Mr. *Wickens* for the defendant W. T. Neve, claimed the aid of the arguments above given.

There was no case in which a deed, executed under circumstances like the present, has been declared void or voidable as against a third party. If the bill had been filed against a volunteer, possibly the deed might be void; but against a purchaser for value without notice, different considerations arise. [The VICE-CHANCELLOR.—Is there any case, in which this Court has refused to interfere where the fraud was practised on the plaintiff himself? In *Joyce v. De Moleyns*(i), the fraud was not practised on the plaintiff.] In that case, the plaintiff was also to blame, but here the defendant Neve is an innocent purchaser.

It was contended, that the defendants were put on inquiry; that argument applied with equal force to the plaintiff. If the plaintiff had not executed the deeds of April, 1856, the defendant Neve would never have advanced the 1300*l*.

Suppose a bill for ejectment were filed in this court, which is really the case, a demurrer would clearly lie. Or “valuable consideration without notice” might be pleaded, and to that plea there would be probably no answer; certainly none in a case like this, where the only equitable right of the plaintiff is to have the deed delivered up to be cancelled.

(a) 3 M. & K. 718.

(b) 11 Ves. 609.

(c) 6 Ves. 174.

(d) 5th ed. 149.

(e) 17 Beav. 285.

(f) 20 Beav. 284.

(g) Cited 2 Vern. 159.

(h) Page 315.

(i) 2 J. & L. 374.

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But this deed is not a nullity in the sense in which a forged deed would be a nullity. Proof of fraud in obtaining the execution of a deed cannot be given in evidence under a plea of *non est factum*. It is pleadable only. No deed has been held void at law for fraud in obtaining execution except in cases where an illiterate man or a blind man has had a deed falsely read over to him: *Thorowgood's case*(a), *Skinner, Anon.*(b), *Collins v. Blenkarn*(c). There are three classes of fraud; in one only of which, viz., cases of forgery and the like, can evidence be given under a plea of *non est factum*. There is a second class where special circumstances must be pleaded, and the deed is not void, but voidable: *Edwards v. Brown*(d). There is a third class where the Court only will interfere. This case is not within the first of the above classes, and therefore the deeds are not void. In order to make this a void deed in equity, there must have been not only a misrepresentation, but such a misrepresentation as the plaintiff had no means of discovering. The affidavit and cross-examination of the plaintiff show that no such misrepresentation was made by Hughes to the plaintiff.

[*Wallwyn v. Lee*(e), *Maynard v. Paupers of East Greenstead*(f), *Re Henessey*(g), *Robinson v. Briggs*(h), *Vandeleur v. Blagrove*(i), *Martinez v. Cooper*(k), *Duke of Beaufort v. Neeld*(l), *Lichbarrow v. Mason*(m), *Marjoribanks v. Hovenden*(n), *Hewitt v. Loosemore*(o), *Jerrard v. Saunders*(p), *Hitchcock v. Sedgwick*(q), were also cited.]

(a) Part. 2 Rep. Vol. 1. 435,
 442; Vin. Abr. Plac. Fait, Vol. 13
 90.

(b) Page 159.

(c) 1 Smith, L. C. 154.

(d) 1 Cr. & Jer. 307.

(e) 9 Ves. 24.

(f) Tothill, 222—256.

(g) 2 Dr. & W. 555.

(h) 1 S. & G. 188.

(i) 6 B. 565.

(k) 2 Russ. 198.

(l) 12 Cl. & F. 248.

(m) 2 T. R. 63.

(n) Dru. 11.

(o) 9 Hare, 449.

(p) 2 Ves. 454.

(q) 2 Vern. 156, 159.

Mr. *Elmsley* and Mr. *Martindale* for the defendants Croft and Baker, representatives of Lydia A. Curling.

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Either Catherine Jones must be considered as the agent of Hughes, so that nothing passed to or from her, in which case the transaction must stand as if the plaintiff had assigned the mortgage on No. 20 to L. A. Curling; or the legal estate really passed to Catherine Jones, and from her to L. A. Curling. Actual notice of the prior transaction was not alleged as against them; then, of whom should they have inquired—of the solicitor, *Kennedy v. Green*(a), or of the vendor, who would have withheld true information?

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— Argument.

In *Kennedy v. Green*, Sir John Leach held that the legal estate did pass; but this is a stronger case, for there was the intention to pass the estate.

[*Rawlings v. Wickham*(b), *Jones v. Smith*(c), *Edwards v. Brown*(d), *White v. Wakefield*(e), *Scholefield v. Temperer*(f), were cited.]

Mr. *A. E. Miller* appeared for the assignees in the bankruptcy of Hughes.

Mr. *Surrage* for Mrs. Chappel (Catherine Jones).

Mr. *Bacon* was heard in reply.

THE VICE-CHANCELLOR:—

In this case the Court must decide which of several innocent persons ought to bear the loss resulting from gross frauds practised upon them all by a solicitor.

Judgment.

The plaintiff, who held a valid mortgage of the leasehold property in question, was by a fraudulent contriv-

(a) 3 M. & K. 718.

(d) Cr. & J. 307.

(b) *Ante*, Vol. I. 355.

(e) 7 S. 401.

(c) 1 Ph. 244.

(f) 1 Johns. 155.

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ance procured to execute deeds by which he conveyed the whole of the property which he held in mortgage. He was made to believe that the deeds which he executed were only leases at a rack-rent, which he was told, it was proper he should grant with a view to a sale. This gross fraud was practised upon him by his own solicitor.

The defendants claim to be purchasers of this property for valuable consideration and without notice, by a title derived under the deeds which the plaintiff had been fraudulently procured to execute.

The solicitor employed by all the defendants, except perhaps the defendant Neve, who seems, however, to have acted entirely on his confidence in Hughes, was this same Hughes who had committed the fraud on the plaintiff. As might be expected, there was complete negligence on the part of the defendants, as to any inquiry on the points which required investigation before they could safely advance their money. Moderate attention in the investigation of these points, must have produced a disclosure of circumstances sufficient to prevent the defendants or any person of ordinary sense from advancing the money.

As usual in cases of this kind, the defendants retort upon the plaintiff the charge of negligence. But there is a distinction. When the plaintiff was imposed upon, the occasion was one on which no extraordinary caution was necessary ; but the fraud practised on the defendants, was on the occasion of their making an advance of money, when they were bound to be on their guard, and to proceed with that degree of caution, care, and circumspection, which the law imposes as a duty on every purchaser.

Since the decision of the case of *Kennedy v. Green*, by Lord Brougham, on appeal, it has become usual to treat such cases as depending on the question of negligence, rather than on the doctrine of implied notice to the purchaser by reason of his employing the same solicitor who had practised the original fraud.

But the whole doctrine of constructive notice depends so much on negligence in not pursuing inquiries, that an accurate examination of the principle, perhaps, leads to the conclusion, that there is not much difference between these two grounds of decision.

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Whoever on the occasion of lending money on mortgage, employs as his solicitor the same person who is solicitor of the borrower, does not show much caution or wisdom; because, according to the view taken by the Lord Chancellor Brougham, in *Kennedy v. Green*, he employs a person who certainly will not disclose any fraud which he may have committed, or any neglect of which he has been guilty. In the case of *Marjoribanks v. Hovenden*(a), Sir Edward Sugden made this observation on *Kennedy v. Green*, which seems not to have often met with the attention which it deserves:—

“It always occurred to me (says that great lawyer), that a very good answer could have been given to the argument that, if Kirby the mortgagee, had looked at the deed, he must have discovered the fraud—namely, why did not you the plaintiff, look at the deed yourself, and thus prevent the occurrence of the original fraud, which, but for your own culpable negligence, would never have been committed?”

After making this remarkable observation on the ground of Lord Brougham's decision, Lord St. Leonards goes on to say that the real ground rests on the circumstances under which the fraud was committed, the mortgagee being considered as fixed by the knowledge which the deeds would have imparted, had reasonable diligence and due caution been used.

In the present case, the clear, concise, and forcible arguments of Mr. Lewis, for the plaintiff, have not been satisfactorily answered, notwithstanding the learning and ability with which the case of the defendants was supported.

(a) 1 Dru. p. 21.

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Whether the case of the defendants be considered on the ground of negligence, or of notice, there seems insurmountable difficulty. All the defendants had notice that the plaintiff was a mortgagee, and that the title was said to be derived through him. Where a purchaser is fastened with notice of a fact, which would have put him on an inquiry which he neglects to make, it is his negligence in not pursuing the inquiry which occasions his loss. So, in this case, the defendants being all aware that the plaintiff had been mortgagee, were bound to know all the particulars of his security from which the title offered to them was derived, and are also fixed with a knowledge of all the unusual and suspicious circumstances which appeared on the face of the deeds of April, 1856, by which the estate which he held as mortgagee, purported to be conveyed to Mrs. Catherine Jones, the pretended mortgagee of the defendants. No solicitor of reasonable skill could examine the deeds of April, 1856, knowing the plaintiff was a mortgagee, without seeing that they disclosed an unusual and extraordinary transaction, which, if it had been investigated, would have prevented any prudent man from advancing his money. On the principle of Lord Brougham's decision in *Kennedy v. Green*, the circumstances of suspicion were sufficiently open to the observation of the defendants, to deprive them of any right to the defence of purchasers for valuable consideration without notice, even if they could be considered as purchasers for Catherine Jones at all.

Therefore, so far as there is any real difference between Sir John Leach and Lord Brougham, as to the grounds of decision in *Kennedy v. Green*, it is immaterial to this case. The employment of Hughes by all the defendants, and the way in which they conducted the transaction with him, exposes them to all the consequences of notice communicated through him, as well as of negligence.

But there are other grounds on which the plaintiff's right to relief seems unquestionable.

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The defence of purchase for valuable consideration without notice was stated by Lord Rosslyn, in the case of *Strode v. Blackburne* (a), to be a shield to protect the possession of property, and not to be available in any case, except to protect the actual possession. Lord Eldon overruled that doctrine in the case of *Walklyn v. Lee* (b), and held, that possession by the purchaser was not necessary, provided he purchased *from an apparent owner who was actually in possession*.

In Gilbert's *Lex Prætoria*, the equitable right of a purchase for valuable consideration is stated thus:—

“If B. obtains a conveyance of land from A. by fraud, and A. quits the possession to B., and B. sells the land to C. for valuable consideration, *bonâ fide* and without notice, A. can never obtain the land against C., because the fraudulent conveyance *with the quitting the possession* transfers an interest; and then, when C. has obtained an interest at law for his money *bonâ fide*, a court of equity ought not to take it from him (c).”

It is impossible, I apprehend, to question the soundness of this statement of the principle, which sustains the defence of purchase for valuable consideration without notice. In the case of *Jones v. Powles*, the mortgagor, who obtained his title by fraud and forgery of a bill, was in actual possession of the estate; and the mortgagor, who claimed by derivative title from him, was also in possession. Therefore, the defence of purchaser for valuable consideration by the mortgagee was sustained, not only on the ground, that that was no reasonable cause to suspect that the bill was forged, but expressly because a long possession had followed the alleged devise; and no reasonable diligence could have led to a discovery of the forgery.

(a) 3 Ves. 232. (b) 9 Ves. 24. (c) Frauds, page 287.

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According to the doctrine now fully established by these cases, unless Catherine Jones had taken possession, and being in possession as apparent owner, had sold and conveyed to the defendant for valuable consideration paid to her, they are not such purchasers as can defend themselves against the plaintiff's right to relief against the fraudulent conveyance to Catherine Jones, and all those who claim by derivative title from her.

The defendants can only show, that they claim as purchasers for valuable consideration from Catherine Jones, who had no possession, nor any apparent ownership of anything; and who appears as a defendant in this cause to disclaim and declare, that she has not, and never had, any ownership or estate in that property which the defendants say she mortgaged to them.

Moreover, the defendants were total strangers to Catherine Jones. They dealt with Hughes as her agent, and paid their money, not to Catherine Jones, but to Hughes. Payment to a person as agent is at the peril of him who pays, and who is bound, before payment, to satisfy himself that the alleged agent has sufficient authority. The defendants, therefore, cannot establish a case of any purchase for valuable consideration from Catherine Jones.

On the whole case, it appears that the plaintiffs claim to be purchasers from one who was in possession of nothing—who was apparent owner of nothing—who could convey nothing, and never received anything—who was merely named as grantee in a deed, the execution of which was obtained by fraud and imposture, and without any knowledge by her that she was acquiring anything, or any intention or wish on her part to have or acquire any such estate or interest, as the fraudulent deed affects to convey to her.

She never borrowed or received any money from the defendants. She never had even possession of the frau-

dulent and void deed, which, without her knowledge, purported to vest the property in her.

She now appears as a witness to prove the fraud, and to disclaim and declare that she has not, and never had, any estate or interest in the property, which the defendants insist is now vested in them by conveyance from her.

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In the case of *Kennedy v. Green*, it was held, that the deed was executed under such circumstances that it passed the estate, and, therefore, was not wholly void, but only voidable. The deeds of April, 1856, are wholly void. If the plaintiff had discovered the imposition practised upon him before the transaction between Hughes and the defendants, and had filed his bill to have the deeds of April, 1856, delivered up to be cancelled, on the ground of the fraud practised upon him by Hughes, there can be no doubt that the Court would have declared those deeds to be wholly void, and would have decreed that they should be delivered up to be cancelled. As the persons named as grantor and grantee had no mind or intention that any estate should pass from the one to the other, and were merely cheated into the execution of deeds without a knowledge of their contents, no estate could pass, and no reconveyance could properly be directed. If the cancellation of the deeds would be the proper form of relief by the plaintiff as against Hughes and Mrs. Jones, the case cannot be altered by the second imposture on Mrs. Jones and the other defendants, and the form of relief should be the same.

There must be a declaration that the execution of the four deeds of 24th of April, 1856, was obtained by the fraudulent contrivances of David Hughes; and that all these deeds are wholly void, and must be delivered up to be cancelled; and also a declaration that the plaintiff is entitled to the full benefit of his mortgage security of

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the 13th of December, 1852, and to the possession of the leasehold property comprised therein as against all the defendants. The costs of the defendants, Chappel and Catherine, his wife, formerly Catherine Jones, must be taxed and paid by the plaintiff; the other parties, plaintiff and defendants, must bear their own costs.

July 24th,
 25th, & 26th.

HOLROYD v. MARSHALL(a).

An assignment of future property is a licence to the assignee to take possession. Therefore an assignment of all the machinery, &c., contained in a schedule, with a proviso that all machinery which should be placed on the premises in addition to or substitution for the machinery assigned should be subject to the trust, was held, to entitle the assignee to machinery added or substituted in priority to a judgment creditor who had taken possession.

THIS bill was filed by Messrs. Holroyd, stuff merchants, and Isaac Brunt, warehouseman, of Leeds, against J. S. Marshall, Esq., high sheriff of Yorkshire, and Emil Preller, and James Taylor, of Hayes' Mill, near Halifax, and prayed as follows:—

That the defendant, the sheriff, his undersheriffs, officers, and agents, might be restrained from selling or disposing of any part of the machinery, implements, and things seized at Hayes' Mill, under the writs of *fi. fa.*, and from intermeddling with any other part of the machinery, implements, and things comprised in the said security; also that the defendant Emil Preller might be restrained from taking any steps to enforce the execution of the said writs, or any other writ or process in the said actions against the same machinery, implements, and things, or any part thereof.

That the sheriff might be ordered to deliver up the

(a) The Lord Chancellor, on appeal, differed from His Honour the Vice-Chancellor; but as the case seems to be new, and of considerable importance, it has been thought right to record the grounds of the Vice-Chancellor's decision.

machinery seized by him to the plaintiffs, or as they should direct.

That the amount of damages occasioned by and referable to the improper acts aforesaid might be assessed, and the defendants, the sheriff and Emil Preller, or one of them, might be ordered to pay the same.

Taylor was a manufacturer, and prior to September, 1858, had been employed to manufacture damask. Taylor, during such employment, became bankrupt, and the machinery and mill gear, &c., were offered for sale by the assignees and purchased by the plaintiff, who thereon entered into the arrangement with Taylor comprised in the following deed.

By an indenture, bearing date the 20th of September, 1858, and made between the plaintiffs Holroyd of the first part, the defendant James Taylor, of the second part, and the plaintiff Isaac Brunt of the third part; after reciting that the said James Taylor was tenant of a mill, buildings and appurtenances, and that the machinery, implements and things specified in the schedule thereunder written were fixed or placed in or about the said premises, and belonged to the said plaintiffs Holroyd absolutely; and that the defendant James Taylor had agreed with the said Messrs. Holroyd for the purchase of the said machinery, implements, and things, at the price of 5000*l.*; but being unable then to pay the purchase-money, it had been agreed that the same should remain unpaid, and, together with interest, be secured in manner thereafter expressed; it was thereby witnessed that, in pursuance of the premises, the said Messrs. Holroyd, by the direction of Taylor, thereby granted and assigned to the defendant Brunt, his executors and administrators, all that and those the machinery, implements and things specified in the said schedule thereunder written (thereinafter called the premises), upon trust for the said James Taylor, until such demand as thereafter mentioned was made, and,

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thereafter upon trust, if the said James Taylor, his executors, administrators, or assigns, should pay unto the said Messrs. Holroyd, their executors, administrators, or assigns, the sum of 5000*l.* and interest at 10 per cent. on demand in writing, for the said James Taylor, his executors, administrators and assigns, absolutely; and to assign the said premises to the said James Taylor, his executors, administrators, or assigns, or as he or they should direct; such assignment to be at his or their request and costs, free from incumbrances by the said Isaac Brunt and the Messrs. Holroyd, or either of them, or the executors, administrators, or assigns of them or either of them; but upon trust, if default should be made in payment of the said sum of 5000*l.* and interest, that the said Isaac Brunt, his executors, administrators, or assigns, should, at the request of the said Messrs. Holroyd, their executors, administrators, or assigns, to be testified in writing, without any further consent on the part of the said James Taylor, his executors, administrators, or assigns, sell the said premises, or any part thereof, either together or in parcels, and either by public auction or private contract, &c.; and to do all acts for effectuating such sale as the said Messrs. Holroyd, their executors, administrators, or assigns, should direct; it was thereby declared that the said Isaac Brunt, his executors, administrators, or assigns, should hold the monies to arise from any sale, in the first place, thereout to pay all the expenses incurred on such sale or otherwise in relation to the premises, and in the next place to apply such monies in or towards satisfaction of the monies for the time being owing on the security of the said indenture, and then to pay the surplus (if any) to the said James Taylor, his executors, administrators, or assigns. "It was, by the said indenture, amongst other things, provided that all machinery, implements and things which during the continuance of the said security should be fixed or placed

in or about the said mill, buildings and appurtenances, in addition to or substitution for the said premises, or any part thereof, should, during such continuance as aforesaid, be subject to the trusts, powers, provisoes and declarations thereinbefore declared and expressed concerning the said premises, and that the said James Taylor, his executors, administrators, or assigns, would at all times during such continuance as aforesaid, at the request testified as aforesaid of the said Abraham Parkinson Holroyd and William Holroyd, their executors, administrators, or assigns, do all necessary acts for securing such added or substituted machinery, implements, and things, so that the same might become vested according." The schedule to the deed, after giving a list of articles of machinery, concluded with the following words, "and all other the machinery, tools, gearing, and effects in or about the said mill and premises."

There was a good deal of conflicting evidence gone into as to the question of possession. The evidence showed, that on the 14th of April, 1860, the sheriff's officer entered on a *fi. fa.* in one of the actions, and took possession, not only of the mill and machinery, but also of Taylor's farming stock. The sheriff's officer, William Lawrence, deposed as follows:—

"On the 14th day of April, 1860, I received instructions from James Davis, sheriff's officer, and accompanied him to the mill and premises occupied by the above defendant, James Taylor, at Ovenden, and received possession of the property in the mill and premises from James Davis, he having lived upon the said premises under a warrant dated the 13th day of April, 1860, No. 164, on *fi. fa.*, in an action in which Emil Preller was plaintiff, and the above-named defendant, James Taylor, was defendant, endorsed 'levy 154*l.* 9*s.* 4*d.* and 1*l.* 9*s.*, for cost of execution, &c., besides,' &c., and which warrant I immediately afterwards received from the said

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James Davis. I immediately made it notorious that I was in possession on behalf of the sheriff, under a warrant. There was no one then in possession on behalf of Mr. Holroyd; the mill, machinery, and premises, were in the possession of James Taylor. I continued in such possession until the sale by auction on Friday, the 25th day of May last.

“On Tuesday, the 1st day of May, a stranger came to the mill and remained about the premises. I heard that he had been sent by Mr. Holroyd. He left on the following day, and another man, named Lucas, who is an assistant to John Buckley Sharp, of Bedford, auctioneer, came to the mill. I had some conversation with Lucas, and asked him what right he had there. He said, he came from Holroyd’s. I inquired if he had any document with him. He said, ‘No;’ the solicitors had told him he required no document; that he would be all right; and he said that I had no business there. Before this occasion no one had been in possession, or claimed to be in possession, for Messrs. Holroyd.”

The deed was duly registered as a bill of sale.

The bill alleged that Messrs. Holroyd, being dissatisfied with the conduct of Taylor in consequence of the sale by him of certain parts of the machinery, served on him, on the 2nd of April last, a demand in writing for payment of the said sum of 5000*l.* and interest, and default having been made in payment thereof, they took possession of all the effects in the mill, and the same were, with the concurrence of the plaintiff Brunt, advertised for sale by auction. The plaintiffs also paid to the landlord of the mill a large sum which was due from the defendant Taylor for arrears of rent, in order to prevent a distress. The effects so taken possession of consisted of the residue remaining unsold of the machinery, implements, and things specified in the schedule, and of added and substituted machinery, implements, and things

purchased by the said James Taylor, of great value.

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The bill further alleged, that, subsequently to the taking possession of the said effects by Messrs. Holroyd and Brunt, but before the sale, the defendant, the sheriff of York, seized the same under the writs of *fi. fa.* sued out against the defendant Taylor in two actions in which the defendant Emil Preller was plaintiff. On the first day of the sale a notice, signed by the attorney for the execution-creditor and the sheriff's officer, and dated the 21st of May, 1860, was served upon the auctioneer, giving him notice that the machinery and effects advertised for sale on the 21st, 22nd, and 23rd of May were in the possession of the sheriff; and that if he proceeded to sell, the sheriff would hold him responsible. The sale nevertheless proceeded, and the whole of the added and substituted machinery was sold.

The bill alleged that the sheriff, notwithstanding, took possession of the property, and removed it from the premises.

The plaintiffs thereon served the sheriff with a notice, dated the 25th of May, alleging that the whole of the machinery and effects belonged to the plaintiffs, and that the sheriff would be held responsible for all damage arising from such wrongful neglect.

The bill further alleged, that the purchasers at the sale insisted on the completion of their respective contracts, and that the sheriff threatened to sell unless prevented by the order of the Court.

On the 27th of June, the plaintiff moved for an injunction, but it was arranged that the plaintiff should stand till the hearing of a motion for decree; and that the plaintiff should be at liberty to complete the sales, and to sell as much more as should amount to 500*l.*, and within one month to pay that amount into court. The sheriff also to pay the monies received by him into court.

On the 11th of May the warrant on the *fi. fa.* in the

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second action executed, was given to the same officer, on which the writ was endorsed, 'levy 136*l.* 14*s.*, and 1*l.* 9*s.* for costs,' by the sheriff's officer, the assistant continuing in possession, as he said, on that warrant, as before on the other. In the mean time, viz., on the 30th of April, a clerk of Mr. Sharp, the auctioneer, named Suddards, entered (as he asserted) into, and was left in possession of the mill on behalf of the plaintiffs Messrs. Holroyd. On the 2nd of May, Suddards saw the sheriff's officer, who, he said, did not claim to have possession, but only threatened to take it. Up to that time no person, he said, was in possession on behalf of the sheriff. Suddards said he regularly locked up the mill every night, whilst he remained in possession, and on the 2nd of May he was relieved by another man named Lucas, on behalf of Messrs. Holroyd.

The evidence showed that Taylor purchased machinery at various times between November, 1858, and 30th of August, 1859. The number of machines purchased was twenty-five, amounting in value to about 500*l.* Some of these machines were in substitution of the old, others were of a different nature and intended to be used for a different purpose. When Taylor sold the old machines, instead of paying the proceeds at once to Messrs. Holroyd, he used the money sometimes in trade and sometimes in the purchase of new machinery. He also sometimes gave old machinery in exchange for new.

On the 21st of May, the first day of the sale, the sheriff's officer, besides giving the notice above mentioned, seized certain lots specifically, and marked them on behalf of the sheriff. The auctioneer did not sell these lots on the first day, saying he would wait for further instructions from his employer. On the second day the auctioneer proceeded to sell the same, without giving any explicit explanation to the sheriff's officer. On the third day the sheriff's officer, after giving notice to the auctioneer, pro-

ceeded with the aid of his assistants to remove some part of the machinery (as he said, with the utmost care, but as plaintiffs' witnesses said, with considerable injury). Other parts he did not remove, at the express request of Taylor and other occupiers of the mill, and he, therefore, sold to them certain articles, for which he received altogether 107*l*. The articles which he removed were those which were pointed out to him by Taylor's book-keeper as having been purchased by Taylor since the execution of the bill of sale, and those only.

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Mr. *Malins* and Mr. *Youl*, for the plaintiffs.

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The bill of sale gave plaintiffs a complete equitable title to the added and substituted machinery, which by the provisions of the deed was to become subject to the plaintiffs' charge, as it was brought from time to time upon the mill. The execution creditor had no higher right than Taylor, through whom he claimed, and even supposing that Taylor was in actual possession at the time of the levy, such possession was sufficient as being consistent with the deed: *Martindale v. Booth*(*a*). The sheriff, on receiving notice of the plaintiffs' title, ought not to have proceeded with the sale. With respect to the original machinery which was on the mill at the date of the bill of sale, it was admitted that the plaintiffs had done enough to protect the legal title to that, and the rule was the same in equity as at law. Assignees in bankruptcy acting under the order and disposition clause, could take advantage of a mortgagee of chattels being out of possession, but a judgment creditor could not. At all events, if it was necessary to show that they were in possession first, the evidence established that point. [The VICE-CHANCELLOR.—Does not the whole question turn upon possession?] By no means; actual possession, except

(*a*) 3 B. & Ad. 498.

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in case of bankruptcy, and by virtue of a special provision, which did not arise in this case, was immaterial. In construction of law, the plaintiffs were in possession throughout. A man might assign all his household goods, chattels, and furniture, by a bill of sale for valuable consideration; and, even if the agreement were that the assignor should retain possession, and that the only object of the assignment was to secure a loan, the possession of the assignor would be the possession of the assignee, and would as such be valid against all the world, with the single exception of bankruptcy.

If the plaintiffs were not in possession, who was? Taylor was not, because that was inconsistent with the deed, which provided that the plaintiffs were first to be paid 5000*l*.

It was submitted therefore, that the decreew as right.

[*Langton v. Horton*(a), *Metcalfe v. Archbishop of York*(b), *Lydd v. Mynn*(c), *Stainsfield v. Cubitt*(d), Notes to *Twyne's case*(e), were cited.]

Mr. *Amphlett* and Mr. *Hobhouse*, for the defendants.

The assignment of a chattel not in existence at the date of the assignment, was inoperative. Then the sole question was the right of the plaintiff to the substituted and added machinery, which was not in existence at the date of the assignment. No doubt, a party might acquire a right to obtain something that was to come into existence, but until that right was exercised, it was an inchoate right, and though binding between the original parties, could not prejudice the right of judgment creditors. Till the plaintiffs took possession, the property remained in the assignee: *Hope v. Hayley*(f). A bill of sale was only executory. In *Congreve v. Evetts*(g), Lord

(a) 1 Hare, 349.

(b) 1 M. & C. 547.

(c) 1 My. & K. 683.

(d) 2 De G. & J. 222.

(e) 1 Smith, L. C. 1.

(f) 5 E. & B. 830.

(g) 10 Ex. 298.

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Wensleydale said, if the authority given by the debtor in the bill of sale has not been executed, it would have been of no avail against the execution. It conferred no legal title, or even equitable title, to any specific goods, but when executed not fully and entirely, but only to the extent of taking possession of the growing crops, it is the same as if the debtor himself had put the plaintiff in actual possession of these crops. If an assignor assigned a future possibility in a chattel, but before the assignee could perfect his title, a third person obtained possession, the right of the assignee was defeated: *Hope v. Hayley*.

It has been contended, that Taylor's possession was that of the plaintiffs, but that was disproved by the evidence, which showed that the plaintiffs had nothing to do with the additional machinery, which Taylor bought at his own discretion. The whole arrangement negatived plaintiffs' case, inasmuch as Taylor was to use the machinery in the business. It was submitted, therefore, that the decree was erroneous, and must be reversed.

[*Gale v. Burnell(a)*, *Lunn v. Thornton(b)*, *Douglas v. Russel(c)*, were cited. See, also *Mogg v. Baker(d)*.]

Mr. Bacon and Mr. Wickens, for the sheriff, submitted to the Court whether, in order to give validity to the assignment, there ought to have been a new bill of sale with an enlarged schedule or inventory, and a new registration, in order to protect the added chattels(e).

(a) 7 Q. B. 850.

(b) 1 C. B. 379.

(c) 4 Sim. 524; a.c. 1 M. & K. 488.

(d) 3 M. & W. 195.

(e) In 17 & 18 Vic. c. 36, the interpretation clause was as follows:

"The expression personal chattels shall mean goods, furniture, fixtures, and other articles capable

of complete transfer by delivery, and shall not include chattel interests in real estate, nor shares nor interests in the stock, funds, or securities of any Government, or in the capital or property of any incorporated or joint stock company, nor choses in action, nor any stock or produce upon any farm or lands which, by virtue

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THE VICE-CHANCELLOR:—

The first part of the defendants' argument is, that future property—chattels not in existence at the time when the property was assigned—cannot pass by the assignment. In a sense that is true. But in the case of *Hope v. Hayley*, it was held that, although it may be that chattels which were not the property of the assignor, but acquired by him after the date of the assignment, do not pass by words which purport to assign future property, yet the effect of the assignment is to amount to a licence on the part of the assignor to the assignee to take possession of them. Try that as applying to this case. This bill of sale is an agreement for the assignment of all the machinery in a certain mill, and it also provides that “all the machinery which, during the continuance of the security, should be fixed or placed in or about the said mill, buildings and appurtenances, in addition to or substitution for the said premises, or any part thereof, should during such continuance as aforesaid be subject to the trusts, powers, provisoes and declarations thereinbefore declared and expressed concerning the said premises.” There is, therefore, upon the authority of *Hope v. Hayley*, by virtue of this bill of sale, a right conferred upon the assignee to the possession of after-acquired property as soon as that property should be acquired by the assignor.

Upon the authority of that case, and upon principle,

of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same shall be at the time of making or giving of such bill of sale.

“Personal chattels shall be deemed to be in the apparent possession of the person making or giving the bill of sale, so long

as they shall remain or be in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding the formal possession thereof may have been taken by or given to any other person.”

it would seem that the assignee, as to all the additional articles now in question, has a licence and right to take possession of them as subject to his security. One of the terms of the security was, that the assignor, as agent on behalf of and for the benefit of these assignees, should continue in possession and as their agent should work the mill, continuing as their agent in possession of all the assigned property. It is not disputed that, as to all the machinery existing at the date of the security, Taylor, the assignor, was properly in possession at the time of the seizure as agent of the plaintiffs. During that possession he purchases the additional articles in question. They are placed in the mill, and made an integral part of the machinery used for the working of the mill; they are in his possession as agent of the plaintiffs, and what more is required? The authority of *Hope v. Hayley* shows that possession by an agent would be a perfectly good possession; and the possession being in Taylor, as agent, when the execution was levied by the defendant, it seems to me that, upon that part of the case, the defence wholly fails.

But it is said, that here the bill of sale was subject to the operation of the Registration Act, which was passed after the decision in *Hope v. Hayley*. The scope and policy of the Registration Act is, that there should be the means of knowing what property is subject to the operation of the bill of sale. The Act therefore provides that every bill of sale and every schedule or inventory which shall be thereto annexed shall be filed. The language of this bill of sale clearly shows that it was intended that after-acquired property should be subject to its operation. In the schedule to the bill of sale, looking at the general words at the end, I find included "all the machinery in and about the said mill and premises." Now, "all the machinery in a mill" is a certain thing; and something which becomes a portion

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of it by addition or substitution cannot, in one sense, be said to be the same machinery. But if the additional or substituted machinery becomes an integral part of the same machinery, it is included in the expression "all the machinery in and about the said mill and premises;" and all the world is informed of its being included in the security by means of the registration of the bill of sale. Therefore, I am of opinion that the plaintiffs have made out their case; and if I am right upon the construction of this bill of sale, I cannot refuse the plaintiffs their costs. The sheriff must be paid by the plaintiffs, who will recover over from the defendants.

July 20th.

Re RUDYERD'S TRUSTS.

A Railway Act, authorising the purchase-monies of lands taken by the railway to be applied in the discharge of land-tax, or incumbrances, affecting the same or other lands settled to the same uses, or laid out in the purchase of lands, tenements, or hereditaments — *Held*, not to authorise the application of the money in rebuilding a new farmhouse and buildings in purchased lands.

RICHARD RUDYERD made his will, bearing date the 21st of December, 1823, by which he devised a certain farm and land in Northumberland to trustees upon certain trusts, which were generally for the benefit of Henry Rudyerd for life, remainder to the use of his first and other sons in tail, remainder to the use of his daughter and daughters, as tenants in common in tail, with remainder over in fee. There was an annuity of 50*l.* a year charged on the estate in favour of the testator's nephew.

The Newcastle-upon-Tyne and North Shields Railway Company, under the powers of the Act 6 Wm. 4, c. lxxvi., purchased certain portions of the land settled for 10,110*l.* 6*s.* 9*d.*, which was accordingly paid into court, and inserted. The 46th section of the Act provided for the payment of the purchase-monies and compensation

into the bank, &c., and proceeded thus: "That the money, when so paid in there, should remain until the same should by order of the Court made upon a petition to be preferred to the said Court in a summary way by the person or persons who would have been entitled to the rents and profits of the said lands, tenements, and hereditaments, be applied, either in the purchase or redemption of the land-tax, or in or towards the discharge of any debt or debts, or other incumbrances affecting the same lands, tenements, or hereditaments, or affecting other lands, tenements, hereditaments, standing settled therewith, to the same or the like uses, trusts, intents, or purposes, as the said Court should authorise to be purchased or paid, or such part thereof as should be necessary, or until the same should, upon the like application, be laid out in a summary way by order of the said Court in the purchase of other lands, tenements, or hereditaments, which should be conveyed, limited, and settled to, for, and upon the like uses, trusts, intents, or purposes, and in the same manner as the lands, tenements, or hereditaments which should be so required as aforesaid, stood settled or limited, or such of them as at the time of making such conveyance and settlement should be existing, undetermined, or capable of taking effect."

There was the usual clause as to the interim investment.

In January, 1857, on the petition of Henry Rudyerd, the tenant for life directed 6000*l.*, part of the sum of 10,110*l.* 6*s.* 9*d.*, should be invested in the purchase of a farm, called the Stantrill and Highworth Farm, in the parish of Charlwood, in the county of Surrey. The purchaser was approved, and the land and buildings were conveyed to the uses declared by the will of the testator.

Henry Rudyerd had one child, a daughter, who became only existing tenant in tail. Prior to her marriage in 1852, with the consent of the protector of the settlement (her father), she executed a disentailing assurance of

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the land and hereditaments (and of the sum of money), and, by a settlement executed on her marriage, conveyed all her real estate, &c., to trustees upon trust for sale, and assigned the said monies upon certain trusts therein mentioned, with power to present or to consent to or oppose any petition, or other application, with reference to the trust premises and the said monies, &c.

Henry Rudyerd and his daughter, her husband, and the trustees of their marriage settlement now presented a petition, praying that the petitioner's costs might be paid out of the sum of 3561*l.* 18*s.* 1*d.* stock standing in court, and that a further sum of the said annuity, sufficient to raise the said sum of 1455*l.* 1*s.* 3*d.* might be sold and paid to the petitioner Henry Rudyerd; he undertaking to apply the same in the erection and completion of the said farm-house, buildings, and works, according to the specifications and plans thereafter mentioned, and in or towards payment of the architect's charges, and to make up the deficiency (if any) out of his own monies.

The petitioner Henry Rudyerd deposed, that, ever since the purchase he had occupied the farm himself, and he had caused the same to be thoroughly drained at an expense of 1500*l.*, raised under the Lands Improvement Acts, and had expended upwards of 1400*l.* of his own monies in repairing some of the farm-buildings and in general permanent improvements; but, by reason of the present farm-house being very old and totally inadequate in the accommodation it afforded for the occupation of a respectable tenant of such a farm, he had been compelled, at great inconvenience and expense, to reside in incommensurable lodgings at some distance off. The petition alleged that the erection of a suitable farm-house upon the estate was absolutely necessary, and that other buildings and works were urgently required for the purposes of the farm; that specifications and plans had been prepared, and that a tender for erecting and completing the works stated in them had been received for 1366*l.* 5*s.*,

which, added to other expenses incurred amounting to 88*l.* 16*s.* 3*d.*, would amount to the sum of 1455*l.* 1*s.* 3*d.*

The evidence produced showed that the existing farm-house was very old and dilapidated, and totally unfit for the residence of a tenant, and that the proposed outlay in new buildings would greatly benefit the inheritance.

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Mr. *Bromhead* appeared for the petitioners, and submitted, first, that the evidence showed that the proposed outlay would be most beneficial to the estate. The Court had sanctioned the purchase of the farm, and it was quite clear that, under the ordinary jurisdiction, the Court had power to order repairs and necessary expenses to be defrayed out of the capital. Here, the Court would clearly have power to purchase an adjacent freehold farm-house; but, if so, how could it be said it could not direct the fund to be applied in rebuilding the old house and offices?

Argument.
 —

[The case of *Ex parte Shaw(a)*, was cited.]

Mr. *Williamson*, on behalf of the railway company, asked that the petitioners might be ordered to pay the company's costs. The petition was obviously informal.

THE VICE-CHANCELLOR:—

The proposed application of the money is not authorised by the terms of the Act of Parliament. It is not a purchase of other lands; and cannot be considered as a debt or incumbrance. It may be, that it would be highly beneficial to the parties interested under the will; but, unfortunately, that is not the question now before the Court. In the case referred to, the sum asked for was small, and it appeared to belong absolutely to the infants. In this case all the parties interested in the inheritance

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are not before the Court. I shall, therefore, make no order on the petition; but it is not a case in which the petitioner ought to be made to pay any costs. Each party must pay his own costs.



GREY v. STUART.

July 7th.

A covenant by a husband in marriage articles to join his wife in assuring to the trustees all property, real or personal, to which the wife should become entitled or interested in, during the marriage—*Held*, not to bring within the settlement, a legacy subsequently given to the wife to bear her own disposal and control, and not to be subject to the *jus mariti*, or liable to be affected by his debts or deeds.

ON the marriage of the Honourable George Grey and Miss Jane Frances Stuart, the following articles were entered into:—

“Articles of agreement made and entered into at Malta this 17th day of January, in the year of our Lord 1845, between his Excellency Lieutenant-General the Honourable Sir Patrick Stuart, G.C.M.G., Governor of Malta, of the first part; Jane Frances Stuart, daughter of the said Sir Patrick Stuart, of the second part; and the Honourable George Grey in the Royal Navy commanding Her Majesty's ship *Belvidere*, of the third part, as follows: Whereas a marriage is shortly intended to be had and solemnized between the said George Grey and the said Jane Frances Stuart, on which occasion it has been agreed between the said Sir Patrick Stuart and George Grey, that, in order to make an eventual provision for the said Jane Frances Stuart and the issue of the said marriage, all the property, whether real or personal, or both, to which the said Jane Frances Stuart shall become entitled during the said marriage, shall be vested in the names of trustees, and settled for the sole and separate benefit of her the said Jane Francis Stuart, and the issue of the said marriage, in manner and form following:—

“ Now these presents witness, that he, the said George Grey, doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said Sir Patrick Stuart, his executors and administrators, that he, the said George Grey, will, at any time or times hereafter, and whensoever thereunto requested, join his said intended wife by good and sufficient deeds and conveyances in the law in conveying and assuring to (a) and trustees nominated and appointed by their mutual consent, and with the approbation of the said Sir Patrick Stuart, all such property, real or personal, as she, the said Jane Frances Stuart, may at any times during the said marriage receive, acquire, or become entitled to, or interested in, by donation, inheritance, succession, devise, bequest, or otherwise howsoever, and that all such property shall be settled in manner and form following; that is to say, to the sole and separate use and behoof of the said Jane Frances Stuart for and during the term of her natural life, and after her decease then to the use and behoof of the said George Grey for and during the term of his natural life, and from and after the decease of the survivor of them, then to the use and behoof of the issue of the body of the said Jane Frances Stuart by the said George Grey, lawfully to be begotten, in such share or shares as she, the said Jane Frances Stuart, shall direct or appoint by her last will and testament, or any codicil thereto, or by any deed of appointment, or other lawful act, to be by her signed for such purpose; and in the event of there being no issue of the said marriage, or of there being no issue alive at the time of the decease of the survivor of them, the said George Grey and Jane Frances Stuart, then such property shall go and belong to such person or persons, and in such manner as she, the said Jane Frances Stuart, may by any will, codicil, deed

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(a) Blank in the original.

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of appointment or other lawful act as aforesaid name or appoint."

There was a blank left for the trustees.

The marriage took place. There were several children of the defendants, who were made defendants.

In 1855, Sir Patrick Stuart died, having appointed executors, who were made defendants.

In 1858, the Honourable Charles Francis Stuart, by his will in the Scotch form, after giving certain legacies, and directing payment of his just debts, made the following disposition:—

"Being now resolved, for the love and favour I have and bear to my relations after named, to grant them the legacies and annuities after specified, and also to declare my will as to the disposal of the residue and remainder of my estate, I do hereby direct and appoint my said trustees or trustee out of my estate and effects other than my said lands and estate of Rawburn, and others in the county of Berwick, to pay to each of my nieces, the surviving daughters of the said deceased Sir Patrick Stuart, namely, Catherine Margaret Stuart, wife of Bryan Holme, Esq., younger of Paul Holme, in the county of York, Jane Frances Stuart, wife of the Honourable George Grey, captain in the royal navy, Mary Janet Stuart, Emily Henrietta Stuart, and Helen Elizabeth Stuart, a legacy of 6000*l.*, which several legacies and annuities hereby granted, or any other legacies or annuities granted or to be granted, by me to any person or persons, except in so far as I may otherwise appoint, shall be payable without deducting legacy duty, of which legacy duty I direct my trustees or trustee, to relieve my legatees and annuitants out of the residue of my estate, other than my said lands of Rawburn and others, and the said legacies granted or to be granted by me, except in so far as I may otherwise appoint, shall be payable, and the first term's payment of the said annuities

shall commence at the first term of Whit-Sunday or Martinmas after my death, with the legal interest thereof during the non-payment; and I will and direct that all legacies, or shares of the residue of my estate, to which any of my nieces or other female legatees who are at present married, or who may be hereafter married, shall be entitled in virtue of these presents, or of any codicil hereto or other writing under my hand, shall be at their own disposal and control, and shall not be subject to the *jus mariti* or right of administration of their husbands, or liable to be affected by their debts or deeds."

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The bill was filed by the Hon. Mrs. Grey against the infant defendants, and the executors of the will of the testator, and it prayed as follows:—

"1. That it may be declared by the decree of this Honourable Court, that the said plaintiff is absolutely entitled for her separate use to the legacy or sum of 6000*l.*, and to the interest thereof accrued due since the death of the said Charles Francis Stuart; and that the defendants, Alexander Charles Stuart, Charles Stuart, and George Dundas, may be ordered to pay the same to the plaintiff accordingly.

"2. Or, that if this Honourable Court shall be of opinion that the said legacy is subject to the trusts of the said marriage articles of the 17th day of January, 1845, then that it may be declared that the same is subject to the said trusts accordingly, and that the defendant Alexander Charles Stuart, Charles Stuart, and George Dundas, may be ordered to pay the said legacy to the trustees of the said marriage articles, to be by them held upon the trusts of the marriage articles accordingly."

Mr. *G. L. Russell*, for the plaintiff.

Argument.
—

The only covenant in these articles is that of the husband, which is merely a covenant to join with his wife in

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assuring real and personal property, to which his wife should become entitled during the marriage.

It was to be remarked that no trustees were named, there being a blank in the articles.

This was the covenant of the husband alone, as to his own acts. He did not covenant on behalf of his wife; and if he had, he had no means of enforcing it. But how could such a covenant make it obligatory on the part of the wife, who, as to this property, was a *feme sole*, to cut down her interest in this property to an estate for life?

The case of *Ramsden v. Smith*(a), was cited, and the cases referred to in the judgment of Vice-Chancellor Kindersley.

Mr. *Bristowe*, for the husband and the children of the marriage, said that these were mere articles, and would, if they had been extended into the usual form of a settlement, have clearly included the after-acquired property.

Mr. *Hobhouse* appeared for the trustees of the testator's will.

Judgment. THE VICE-CHANCELLOR:—

The clause referred to, was introduced into these articles for the purpose of protecting the interests of the wife and children against the marital right. But no question as to the marital right is raised on this bill.

The testator under whose will this property was derived, had a right to give it to whom he pleased and how he pleased. He has chosen to give it to this lady in such a manner as to exclude the right of her husband to deal with it in any manner. How, then, can it be said that it is within the operation of the husband's covenant?

(a) 2 Drew. 290.

There must be a declaration, that this sum of 6000*l.* is the absolute property of the wife. There must be no order as to costs.

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HEMMING *v.* GRIFFITH.
GRIFFITH *v.* HEMMING.

July 9th.

IN this case there were two suits, one *Hemming v. Griffith*, for performance of articles, dated the 24th of June, 1825 ; a compromise was shortly afterwards entered into, but a subsequent dispute having arisen, the suit of *Griffith v. Hemming* was instituted, for the specific performance of the agreement.

An agreement for the compromise of the litigation was subsequently entered into on the 3rd of December, 1855, in which it was provided that the amount of Mrs. Hemming's portion should be settled by the Court. The amount of the portion was accordingly left in blank, and the question now raised was, what was the amount to be inserted in the decree.

The provision in the articles for raising portions was as follows :—" And in the next place upon trust by sale or mortgage, or by felling timber, or by bringing actions for rent in arrear, or by any other of the aforesaid ways and means, or by any other lawful ways or means, if there shall be but one child of the said intended marriage, other than and except an eldest or only child, whether son or daughter, for the time being entitled to the hereditament for an estate of inheritance in tail male in possession, or in remainder immediately expectant upon the decease of the survivor of them the said Hugh Davies Griffith and Hester Thomas, then to levy and raise the sum of 8000*l.* for the

Where marriage articles directed, if there were but one younger child of the marriage, 8000*l.* to be raised for portions ; if two, 12,000*l.*, and if three or more, 15,000*l.*; and there were three younger children of the marriage, of whom two died infants,—*Held*, that the trust to raise 15,000*l.* had arisen, in favour of the surviving younger child.

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portion of such child in equal shares out of the said respective estates; and if there shall be two such children of the said intended marriage, except as aforesaid, then to levy and raise the sum of 12,000*l.* for the portions of such children in equal shares out of the said respective estates; and if there shall be three or more such children, except as aforesaid, then the sum of 15,000*l.* for the portion or portions of such several children in equal shares out of the said respective estates; the same sum of 8000*l.* to be paid to such one child, and the other sums to such children at such times and in such shares and proportions (if more than one), and either wholly or partially to the exclusion of any one or more of them, and subject to such conditions and limitations over for the benefit of any or either of them, as the said Hugh Davies Griffith and Hester Thomas shall, by any deed or deeds, with or without power of revocation, to be sealed and delivered by them in the presence of two or more credible witnesses, from time to time, jointly direct or appoint; and in default of such joint direction or appointment, then, as the survivor of them, the said Hugh Davies Griffith and Hester Thomas, by any deed or deeds to be executed as last aforesaid, or by his or her last will and testament, to be signed and published in the presence of, and to be attested by three or more credible witnesses, shall direct or appoint; and in default of such direction or appointment, and subject to any such as shall be made, to become a vested interest in such child or children being a son or sons at the age of twenty-one years, or being a daughter or daughters at that age or marriage, which may first happen; but if the said Hugh Davies Griffith shall survive his said intended wife, the said portion not to be payable unless otherwise directed under the said power of appointment, until after his decease. And if the said Hester Thomas shall be the survivor,

then one moiety of such portion not to be payable until after her decease, and the other moiety to be payable after the decease of the said Hugh Davies Griffith, unless otherwise directed as aforesaid. There was also a power enabling the said Hugh Davies Griffith and Hester Thomas jointly, to reduce the portion of one only younger child to 5000*l*. And in the said intended settlement shall moreover be contained a power for the said trustees, after the decease of the said Hugh Davies Griffith and Hester Thomas, or in their lifetime by their consent (but subject as aforesaid), by any of the ways and means aforesaid, to raise and obtain any part of the portion or portions by way of advancement of the said child or children, and also a proviso that after the decease of the survivor of the said Hugh Davies Griffith and Hester Thomas, and during the suspense of vesting the said portions, the said trustees shall raise interest on the said portions after the rate of 4 per cent. per annum, and apply the same or such part thereof as they shall think fit for and towards the maintenance and education of such child or children during their respective minorities, and the overplus, if any, by way of accumulation for his, her, or their benefit."

The evidence showed that there had been issue of the marriage four children, Hugh Thomas Davies Griffith and Hester Griffith, both of whom were now living, Caroline Griffith, who died on the 16th of September, 1838, and Elizabeth Anne Griffith, who died on the 11th of July, 1830. Hester Griffith had since married Mr. Hemming. Mrs. Griffith died in 1829, without having exercised the power of appointment.

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Mr. *Craig* and Mr. *Surrage* appeared for Mrs. Hemming.

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Mr. *Malins* and Mr. *J. L. Bird*, for the tenant in tail.

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The trust to raise portions must be administered, having regard to the necessity for raising them. The language of Lord Hardwicke was this:—"The question is upon the construction of the deed and intent of the parties, which was that, subject to the provisions therein, the whole should be settled for the benefit of the eldest son; nothing, therefore, could be taken from him but according to the intent of those provisions" (a).

Applying the principle laid down in that case, it was clearly the intention in these articles that the portions to be raised should vest only at twenty-one in the case of sons, or in case of daughters at that age or marriage. The true construction of these articles was, that the sum of 8000*l.*, 12000*l.*, and 15,000*l.*, were to be raised, having regard to the number of younger children who should be in existence when the portions were required. The true construction, therefore, was, that there was but *one* younger child (*i. e.* Mrs. Hemming), when the portion was required; and, if so, the estate was only charged to the extent of 8000*l.*

Argument.

Mr. Bacon and Mr. Rowcliffe appeared for the tenant for life.

Mr. Schomberg and Mr. T. C. Simpson, for other parties.

Judgment.

THE VICE-CHANCELLOR:—

It is admitted by those who have argued in favour of the owner of the inheritance which is said to be charged, that, in this case, there are trusts for raising portions to be executed. It is certain that, according to the language of the trusts, there were three different states of the family, as to the children which were to be portioned, upon the existence of either of which

(a) Cited in *Hubert v. Parsons*, 2 Ves. sen. 263.

three different states the amount to be raised would be different. According to the language as it stands, if there should be only one child to be portioned, other than an eldest or only child, 8000*l.* only was to be raised; and, according to the clear language of the settlement, if there should be three or more children, other than an eldest and only child, it is certain that the amount to be raised was 15,000*l.*

It seems clear enough that, if there should be three or more children, other than an eldest or only child—during the infancy of the three children, those trusts for raising the 15000*l.* were to have an operation, and might be resorted to for the purposes of advancement and maintenance. In the case of there being three infant younger children, then maintenance could not have been provided under the trusts for raising 8000*l.* Nothing could have been done in such a case during the infancy of the three children, if the 15,000*l.* was not the sum upon which the trusts for advancement and maintenance were to operate. Even in the event of any of the children dying under age, the purposes of maintenance and advancement could only be accomplished by calling into operation the trusts for raising 15,000*l.*

If that be so, how can anything which has happened since the three younger children were born recall the trusts for raising portions to 8000*l.* only, which was to be raised expressly, and in terms, in the event of there being only one other than an eldest or only child? In my opinion, the language is a great deal too strong. No doubt it has been settled that, in construing executory instruments, the Court will not fetter itself by a servile adherence to the language of the articles. But the Court will not alter the trusts, where they have been clearly declared in the language of the articles.

It is true, that the Court inclines against charging portions on real estate, unless where the portions have become

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vested. But there is nothing to justify the Court in taking such a liberty with these articles as has been asked.

The case cited is important for this, that, in a case where trusts do not come into operation at all, if there be an eldest and only son, another child having died at an immature age, the Court will be justified in saying that the trusts do not come into operation at all, because the money is not payable to anybody except to the legal personal representative of the child. But Lord Hardwicke's decision is an authority in favour of holding, in a case like the present case—where the trusts are certain, the amount to be raised is certain, and the events have happened on the occurrence of which the trusts are to come into operation—that the whole amount is to be raised, viz., 15,000*l*.

There must be a declaration, that Mrs. Hemming is entitled to a portion of 15,000*l*.

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HERRETT v. REYNOLDS.

May 2nd.

MR. WELFORD, in this case, moved to dismiss the bill for want of prosecution. An attachment having been obtained against the defendant for want of an answer on the 4th of November, 1859, the defendant filed his answer, of which the plaintiff took an office copy, but filed no exceptions, and the answer therefore became sufficient. Nothing had been since done, and the defendant consequently was entitled to move to dismiss the bill for want of prosecution.

Where a defendant in contempt, filed his answer, and the plaintiff, having taken an office copy, filed no exceptions, the answer becoming sufficient:—*Held*, that the plaintiff having thus accepted the answer without insisting on his costs, the defendant was entitled to move to dismiss the bill for want of prosecution.

Mr. H. Stevens, for the plaintiff, submitted that the defendant could not move to dismiss without having cleared his contempt: *Vowles v. Young*(a). The only act done by the plaintiff was to take an office copy of the answer, but it had been expressly decided that the plaintiff did not thereby waive the contempt: *Woodward v. Twinaine*(b). It was submitted, therefore, that the defendant was not entitled to move to dismiss, and that the application must be refused with costs.

The VICE-CHANCELLOR said, that until the plaintiff took an office copy of the answer, he had no means of knowing what it contained; but the plaintiff here had not only taken an office copy, but had allowed the answer to become sufficient by effluxion of time. It was clear by so doing, he had accepted the answer without insisting on the costs, and, if so, was not in a position to resist this motion. There must, therefore, be the usual order that

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(a) 9 Ves. 173.

(b) 9 Sim. 301.

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the bill be dismissed unless the plaintiff within a week file a replication.

NOTE.—In *Anonymous*, 15 Ves. 175, Lord Eldon said: "Having consulted the Registrar, the plaintiff, by accepting the answer, does not lose his costs as costs in the

cause, but only waives the remedy by process of contempt, and cannot enforce payment of the costs by that process, which by taking that step he has given up."

June 21st,
25th, 26th;
and July 2nd,
3rd, 4th, 5th,
6th, 7th, 9th,
10th & 11th.

Claim by the plaintiff to use water which flowed from his land to the defendant's land, and was there collected in a reservoir, whence it re-flowed into the plaintiff's land.

Claim also by the plaintiff to the over-flow into his land of a pond, which flowed through the defendant's land into that of the plaintiff. The claims being unsupported by evidence of twenty years' user—*Held*, they could not be maintained.

ENNOR v. BARWELL.

THE plaintiff was Nicholas Ennor, and the defendants Edward Barwell, and by amendment T. H. Wright. By an indenture of lease dated the 8th of February (in pursuance of a previous agreement), the Ecclesiastical Commissioners granted to the plaintiff the exclusive right to work for ten years the mines and minerals lying under certain lands, consisting of sixteen acres, in the out-parish of St. Cuthbert, near Wells; and also the right to use such water and watercourses, arising or running, being or belonging, or which during the said term should arise or run, or be or belong, in, through, upon, or into, the said close of land, subject to the estate and interest of one Henry Davis. By an agreement dated the 11th of August, 1857, the said Henry Davis agreed to grant a lease of the surface for the same terms, together with all rights of way and water of the said Davis.

Under these agreements, the plaintiff was in possession of the surface and of the mines. It was said that the

But, *Held*, that the plaintiff was entitled to water flowing from surface springs in the defendant's lands, and which naturally flowed, but not through perfectly defined channels, into the plaintiff's land; and was entitled to an injunction to restrain the defendant from diverting it.

minerals were the *débris* of mines, which had been worked by the Romans imperfectly, and which contained a large proportion of ore.

The bill alleged that the defendant was in the possession of certain land lying on the north-east of the plaintiff's close, and from which land several springs or streams of water had from time immemorial flowed in certain defined natural channels or courses into and across the plaintiff's close. The plaintiff had commenced working the ores and minerals upon the said close, and had from time to time used and applied the water of the said springs or streams, which then flowed in its natural channels, into the plaintiff's close, as the plaintiff alleged, and would still continue so to flow, if the water thereof were not diverted and carried away out of such natural channels or courses, by the wrongful acts of the defendant and his agents or workmen.

That since the plaintiff had been in possession of the said close, he had commenced working the ores and minerals in and upon the same, and had from time to time used and applied the water of the said springs or streams, which then flowed in its natural channels into the plaintiff's close or some part thereof, for dressing and working the said ores or minerals, as he was of right entitled to do, and had erected works for that purpose.

The defendant had on several occasions since the plaintiff commenced operations, caused dams to be erected and trenches to be cut outside the water of the plaintiff's works, for the purpose of obstructing and diverting the water of the said springs or streams, which ought to flow from the land in the possession of the defendant to the close of the land in the possession of the plaintiff, and the plaintiff had from time to time caused such obstructions to be removed, and so long ago as the 26th of March, 1858, caused the following letter to be written by his solicitor to the defendant, E. H. Barwell:—

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“Sir,—I am instructed by Mr. Nicholas Ennor, to inform you that the steps which have been taken in obstructing and diverting the streams of water from their proper channels, into and through the lands which he has recently become the lessee of in the parish of Priddy for mining purposes, are altogether illegal, and render you liable to an action-at-law, as well as to an indictment for the trespass committed; and I hereby give you notice, that unless the obstructions be forthwith removed, and the water again allowed to return to its natural channel, and where for more than sixty-six years last past, it has been accustomed to take its natural course, legal proceedings will, without further notice, be commenced against you.

“I am, Sir, your obedient servant,

“WM. BURRIDGE.”

The plaintiff received the following reply:—

“Sir,—The Waldegrave Mining Company have no intention or desire to do any illegal act, and I am not aware of any trespass having been committed, except by Mr. Ennor’s men, who, as I am informed, by his directions entered upon the Countess Waldegrave’s lands, and cut an opening in the ground for some distance from the wall on her ladyship’s property; neither am I aware of there being any stream of water to obstruct or divert passing from Lady Waldegrave’s ground to that in Mr. Ennor’s occupation; and the only act of the Waldegrave Company has been to preserve the water which is collected on the Countess Waldegrave’s lands, and which is required for working and washing the deposit at our own works, and we are advised for these purposes we are fully justified in what we have done. I understand Mr. Ennor was in this neighbourhood last week, and if he has any complaint to make, it is strange he did not call upon me, for I happened to be at home from Monday to Friday. I

am really sorry there should be these differences with Mr. Ennor, and you are at liberty to tell him so.

“ I am, Sir, your obedient servant,

“ E. H. BARWELL.”

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The plaintiff claimed a right to the flow of the said springs in their natural course into his said close, and to the use of the water thereof, and alleged that defendant had lately sunk a deep shaft or pit upon the land in his possession, and had erected dams and cut trenches or gutters along the surface of such land, by means whereof he carried the water of the springs, except one, from their natural channels or courses thereof, into and collected the same within a shaft or pit, or by means of a pump standing in the said shaft or pit, and of a steam-engine on the land connected with a pump, whereby he raised the water fifteen feet above its natural basin, so as to flow into the reservoir, and the other of the said springs which flowed on the eastern side of the reservoir, the defendant carried away the water therefrom into the reservoir by means of a trench cut along the surface of the land, communicating directly from the natural course thereof to the reservoir, and by these means diverted the whole water of such springs from the accustomed channel, and carried the same away, and never returned the said water into its natural channel, so that no part flowed into the plaintiff's close, and he was deprived of the use thereof.

There was also a spring which lately flowed from land on the western side of the reservoir, not in the defendant's possession, but belonging to the Ecclesiastical Commissioners, into the plaintiff's close, to the use of which the plaintiff was entitled, by occupation of the close, under the lease. The defendants also carried away the water into the reservoir by a trench, which they cut in the land of the Commissioners, and through a hole in the wall, and along the surface of his own land, communicating

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directly from the natural channel thereof to the said reservoir, and never returned the water to the natural channel, but entirely diverted the same, and deprived the plaintiff of the use thereof, and carried the same away, and collected it in the said shaft or pit, from whence it was afterwards pumped into a reservoir. The water was never returned into its natural courses or channels, but was sent away in an opposite direction.

The plaintiff's close was part of an open tract of common land in the out-parish of St. Cuthbert's, which was allotted and inclosed about sixty years ago. The said close, on the north-east side thereof, lay partly within and partly without a wall which was built there upon the said close, and which ought properly to have been carried from one end to the other of the close in a perfectly straight line, according to the boundary marked out when the common was inclosed. Owing to the swampy nature of the ground, however, it was found impossible to build the wall in a straight line; consequently, it was carried in part to the northward of the proper boundary, so as to leave a portion of the plaintiff's close lying outside the wall, between it and the land in the possession of the defendant. The proper boundary was, nevertheless, clearly defined. Upon that portion of the plaintiff's close which lay outside the wall, there was a pond or pool of water belonging to the plaintiff, or to the use of which he was entitled. On the 14th of June, 1859, the defendant sent a gang of workmen and caused a deep trench to be cut from the said pond or pool, whereby the whole of the water was carried away therefrom to his shaft or pit, and was afterwards pumped into the reservoir and never returned to its natural channel.

The above-mentioned reservoir on the defendant's land was of several acres in extent. The plaintiff's predecessors, occupiers of the close, had, as it was alleged, during forty years enjoyed, as of right, the use of the

water of the reservoir for their mining operations, by conducting the same through a deep trench leading direct from the reservoir through the land in the defendant's possession, into and through the plaintiff's close. The late Dr. Somers, the plaintiff's predecessor in title, worked two large water-wheels on the said close for the purpose of his mining operations, and continued to do so down to the time when he ceased to work the mines, about fourteen years before. The defendant had lately raised the original pond-head or embankment of the said reservoir on that side which was next the plaintiff's close, to a height of between two and three feet above its former level, and thereby raised the level of the water within to a corresponding height, so that the water, instead of flowing out in the direction of the plaintiff's close, as it formerly used to do, now flowed in an opposite direction, into a pond belonging to the defendant, and was thence carried away into a natural opening in the earth called a "swallett," and entirely lost.

The plaintiff alleged that, by these means, the plaintiff was entirely deprived of the use of the said springs or streams and pond respectively, as well as of the water contained in the reservoir, and prayed that the defendant might be restrained from interrupting or disturbing him in the free use and enjoyment of the said springs, &c., and from continuing to divert and carry away the same, and from otherwise damaging or injuring the plaintiff in the rightful enjoyment of the flow and use of the water of the said springs or streams, pond and reservoir respectively.

The defendant Barwell filed his answer, in which he alleged, among other things, that, in March, 1858, the plaintiff, on two occasions, proceeded to cut trenches leading into the Priddy minery from ponds and holes in the Chewton minery, through and under the boundary wall, which trenches were afterwards stopped by the de-

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defendant's workmen. The defendant said that the plaintiff, being a practical miner, must have known that it would be necessary for the defendant to drain the Chewton minery before the slags and slimes under the surface could be raised and worked; that the course adopted by him, the defendant, was the proper and ordinary mode adopted in mining operations; and that the ancient miners of Mendip, centuries ago, discontinued the large lead works there, in consequence of their not possessing the knowledge or application necessary to enable them to remove the water which accumulated in the pits from which they extracted the lead ore. The defendant alleged he had been informed and believed, that, many years since, Dr. Somers, since deceased, worked the Priddy minery, and that he caused a trench to be cut from the ancient bank at the south-west end of the reservoir, and continued the same through the wall of the Priddy minery; but defendant was informed and believed, that, about twenty-two years since, the trench was stopped. He further said, that there were no springs upon the Priddy minery, except what was called the Pot-water stream, and none whatever on the Chewton minery; and that the only water which had ever been used by him, the defendant, in his said works at Chewton minery aforesaid, had been rain or surface water, or water percolating through the soil from the neighbouring hills, and accumulated or collected by the defendant in manner therein stated.

The defendant, by his answer, having objected that Thomas Hunt Wright and himself constituted the Waldegrave Mining Company, the bill was amended by making Wright a defendant.

There being a dispute, whether the natural flow of the water from north to south, or from south to north, his Honour made an order, giving the plaintiff liberty to inspect and cut trenches into the defendant's mine to ascertain the geological structure of the soil, but this part of the order

was discharged by the Lords Justices. On the hearing of the case being resumed, his Honour thought the freeholders ought to be made parties, but the Lords Justices were of opinion that the Court might take care that the rights of the freeholders should not be prejudiced, and the hearing might be proceeded with on the merits, leaving it to be seen whether, ultimately, it might not be defective for want of parties.

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There was a mass of evidence, in some respects conflicting. It was alleged, on behalf of the defendant, that the defendant had employed the plaintiff in 1854, in certain lead mines in Chewton Mendip, and pointed out to him certain works then being mined at the north-east end of Chewton minery, and informed him of the rich deposits which had been left after the certain old minery works at the south-west, and told him he was in negotiation with the Bishop of Bath and Wells for a lease. The defendant further alleged, that the plaintiff, without previous communication with him, obtained an agreement. In 1854, the defendant began to work the Chewton minery, and in 1856 requiring more water, with consent of the landowners cut a surface drain to collect the water from the hills. He also obtained permission from a Mr. Pearse to make a drain from a pond in his ground, made about twenty-five years before, to his minery, and also from another person to make surface drains from small holes or ponds on his land which had been previously made on Stock's Hill, by one William Thatcher for supplying his cattle with water.

The plaintiff's evidence alleged that the defendant had raised the height of the embankment and of the water, but this the defendant positively denied, alleging that it was an ancient embankment, on the top of which there was a footpath which had worn down. The defendant alleged he had simply repaired the bank to the height of one foot ten inches.

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Mr. *Malins*, Mr. *Wickens*, and Mr. *Hanson* for the plaintiff.

The evidence showed that the plaintiff, as lessee of the Priddy minery, was entitled by prescription to the use of the water from the reservoir and from the adjacent land.

Every proprietor of the land on the bank of a stream was entitled as of right to the use of water flowing from a higher level, and the owner of the land through which the stream passed was not at liberty to injure the quality or diminish the quantity of the water: *Wright v. Howard*(a), *Mason v. Hill*(b), *Wood v. Waud*(c).

In this case it was proved that the rain water which fell on Stock's Hill and in Pearce's Pond, would flow through a defined natural channel into the Priddy minery, and that, but for the obstruction caused by the defendants, the water in the reservoir, when it rose beyond the usual level, would run down by a natural channel into the plaintiff's land. In fact, a considerable part of the water which the defendant collected really rose from springs which lay in the plaintiff's lands. It was well settled that a mere possessory title entitled a person to maintain an action for diversion of water, and consequently to obtain an injunction.

It was submitted that the plaintiff was entitled to a perpetual injunction and the costs of the suit.

Mr. *Bacon* and Mr. *Francis Webb*, for the defendants, contended that the plaintiffs, in order to make out the case, were bound to show an uninterrupted use of the water for twenty years, and this they had wholly failed to do.

(a) 1 S. & St. 190.

(b) 3 B. & Ad. 304; 5 B. & Ad. 1.

(c) 3 Ex. 748.

All that the defendants had done was to make use of the pond which they found there when they took the Chewton minery, and with the consent of the adjacent landowners, and at great expense to themselves, had cut trenches to conduct the water from such lands into their mine. It was necessary to remove the water, both to make the slime and slags available as well as to fill the reservoir.

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It was submitted, that the plaintiff was entitled to collect the water in the way he had done, and in any way without the consent of the defendant: *Broadbent v. Ramsbotham*(a), *Chasemore v. Richards*(b).

On the whole case, it was submitted, that the bill must be dismissed with costs.

Mr. *E. Foakes* held a watching brief for the lessors.

THE VICE-CHANCELLOR:—

Judgment.

This case is one of great difficulty—difficulty not diminished by the mass of evidence that has been gone into on both sides. The bill is filed for an injunction in support of a legal right. In order to succeed, the plaintiff must establish a right to certain streams of water which, he alleges, have flowed uninterruptedly from the Chewton minery and lands into the Priddy minery for so long a time as to give him a right to the protection of this Court by its injunction.

The first and most important point is as to the right to the water collected in the reservoir, which is situated not far from the boundary wall between the Chewton minery and the plaintiff's land. The evidence clearly shows that there is an ancient embankment at the south end of that reservoir, the purpose of which

(a) 11 Ex. 602.

(b) 2 H. & N. 168; s. c. 7 Ho. Lds. Cas. 349.

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obviously is to throw back the water which would naturally flow down into the Priddy minery, and by throwing it back to form that reservoir, the right to the water of which is in dispute. It is clearly shown in evidence that the embankment is an old one, so old as to give the owner of the land upon which the embankment is made the right to pen and throw back the water; and the plaintiff, in order to show that he has a right to any part of that water, must show the uninterrupted enjoyment for a period of more than twenty years of the water of that reservoir by some outlet, which has permitted it to flow into the Priddy minery.

There is evidence on the part of the plaintiff to show that there was a hatch in that embankment which is said to have been situated about the middle of the embankment; and there is evidence to show on the part of the plaintiff that that hatch was removed from the middle of the embankment to the west end. The plaintiff has also shown that Dr. Somers was the tenant of the Priddy minery, and he seems—although there is a conflict of evidence upon it—to have also had a right to the Chewton minery. There is evidence to show that Dr. Somers, through that hatch, had and enjoyed a right to the water in the reservoir, conducted into the Priddy minery, along a trench dug by him.

Upon the fullest consideration, and on the most attentive view that I can take of all the conflicting evidence upon the subject, I can find no sufficient evidence that the water from that reservoir ever flowed into the land of the Priddy minery through any defined or natural channel, within the time of legal prescription, other than through the channel cut by Dr. Somers. There is a conflict of evidence as to the time when that channel ceased to be used, but it is perfectly certain that it was not used within one year before the time when the plaintiff filed his bill. The statute of

2 & 3 Wm. 4, c. 71, has settled the law upon this subject; and the plaintiff, in order to show his right to a flow of water through that embankment, to which the owner of Chewton has a prescriptive right, must show an uninterrupted enjoyment for the term of twenty years, and must show moreover, under the 4th section of that statute, that there was not an interruption for one year before the time of filing the bill.

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I, therefore, come to the conclusion that, upon the evidence and upon the law as settled by the decision in *Wright v. Howard* and in other cases, the plaintiff has failed to show a right to an opening in that ancient embankment to conduct any stream of water into the Priddy minery. As to the reservoir, therefore, my opinion is, that the plaintiff's case has failed.

If I am correct in this view, it is unnecessary to go into the question about the deep drain in the reservoir, and it is unnecessary also to go further than I have already mentioned into the question of the natural flow of the water. I consider it established that, but for that ancient embankment, the water, from the natural inclination of the country, would flow down from the Chewton minery into the Priddy minery. But inasmuch as that natural flow of the water has been interrupted by the right to that embankment, which is an ancient embankment, the plaintiff having, in my opinion, failed to show any legal right to a channel through, or opening in that embankment, within a reasonable time, has failed in that part of the case.

The next part of the case is as to Pearce's pond. According to the defendant, that pond is not supplied by any spring; but, according to the evidence of the plaintiff—which is what I consider to be the truth of the case, from the balance of the weight of the evidence on both sides—Pearce's pond has a perennial supply of water, which rises from the ground, although it may not

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gush forth like a spring, in the ordinary sense of the word. It is an excavation constantly filled by water to the depth of two feet, and is considerable in extent. But it was made twenty-six years ago, and made upon land which was not included in the demise to the present plaintiff. It was made by a person of the name of Pearce in his own field, he being the tenant of the Ecclesiastical Commissioners, who are the landlords of the soil. Two or three years before the present bill was filed, in 1856, Pearce allowed the water of this pond to be diverted by a drain cut and leading towards the reservoir. There is no evidence of any certain or defined channel ever having been made, or existing, to conduct the water from this pond down into Priddy minery. This, I say, on the balance of the whole of the evidence. Giving due weight to the evidence on both sides, I cannot come to the conclusion that during the twenty-six years from the formation of Pearce's pond there was any defined or certain channel for the water from it, till that channel was cut by the present defendant, under a licence from Pearce himself. If there has been a channel through the wall, as the plaintiff's witnesses state—and that was only a casual and precarious supply—it has been interrupted for more than a year before the bill was filed; and, therefore, if the plaintiff had ever any right it was lost; but, in my opinion, the plaintiff never had any right to it.

There remain, however, two other parts of the case, which, upon the conflicting evidence, and from the state of the law as stated in some cases, have created the greatest difficulty in my mind. The plaintiff claims to be entitled to have the water flowing from certain openings, which he calls springs, upon Stock's Hill, and claims that it shall be allowed to continue to flow, as his evidence shows it has flowed, towards and into Priddy minery. The defendant endeavours to support his case by stating that these openings upon

Stock's Hill are not springs—that the water is merely rain water, and that when it accumulates from heavy falls of rain in such quantities as to overflow these openings, it does not flow in any defined or certain channel down the hill or towards the Priddy minery. Upon the weight of the evidence I have come, though with some hesitation, to the conclusion that there is a sufficiently defined channel for that water to be within the protection of the Court. I am of opinion that the defendant's case as to the water in these openings being merely stagnant water, and a collection of stagnant rain-water, has entirely failed. The truth of the case as to these openings is, I think, stated in a way which reconciles the whole of the evidence by the testimony of Professor Ansted. These openings are what may be called surface springs, and they are always filled with water—water which percolates through the soil, probably (as in the case of other springs) rain water. They occur generally near the higher parts of the land, and do not generally obtain their supply from water lodged at any considerable depth. I think it proved that there is a perennial supply of water arising from these springs upon Stock's Hill, and I think it is sufficiently established that the water from these surface-springs would, but for the interruption occasioned by the defendant, be flowing now; and from the inclination of the ground must flow into the Priddy minery. The difficulty that I have felt upon the law in this part of the case is from the expressions attributed to some of the judges in the cases of *Broadbent v. Ramsbotham* (a), and *Chasemore v. Richards*. The doubts expressed by Mr. Justice Coleridge, upon grounds which he has very clearly expressed, and also the doubts entered upon, but not entirely discussed by Lord Wensleydale, in his judgment in *Chasemore v. Richards* (b), will probably find a place in the

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(a) 11 Ex. 614.

(b) 7 Ho. Lds. Cas. 390.

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mind of every man who deeply considers the question. Baron Alderson, however, in the case of *Broadbent v. Ramsbotham*, says, that "All the water falling from heaven, and shed upon the surface of a hill, at the foot of which a brook runs, must by the natural force of gravity find its way to the bottom, and so into the brook, but this does not prevent the owner of the land upon which it falls from dealing with it as he pleases, and appropriating it. He cannot, it is true, do so if the water has arrived at, and is flowing in, some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such a channel. There is here no watercourse at all." In a case of *Rawstron v. Taylor (a)*, before Lord Wensleydale (then Baron Parke), he said: "This is a case of common surface-water, rising out of springs or boggy ground, and flowing in no definite channel, although contributing to the supply of the plaintiffs. The mill-water having no defined course, and its supply being merely casual, the defendant is entitled to get rid of it in any way he pleases." The language in these cases applies to every supply of water which is casual and occasional. Springs and boggy ground are the ordinary sources of all streams entitled to protection. If the water from Stock's Hill had been common surface-water, and without any constant supply, or defined course, of any kind, I should have been bound to hold that the case of the plaintiff as to the water from Stock's Hill had failed. But, in my opinion, from the evidence it is clear that the water at Stock's Hill is not common surface-water. I think it is established that it is not an inconstant supply of water, but, more or less, there is always water there. I think also, that, although from the nature and situation of those surface-springs, the channels cannot be expected to be very deeply furrowed or accurately defined, yet I am clearly of opinion this cannot be considered

(a) 11 Ex. 382.

as water casually falling and occasionally diffused along the surface of the ground. Therefore I have come to the conclusion, that the water being supplied by accumulation and percolation, affording a continuous supply to these surface-springs and from them, sometimes in abundance, at other times in a scanty degree, flowing naturally into the Priddy minery, the defendant, by digging a trench which intercepts the flow of that water from these springs, has intercepted the legal right of the plaintiff, Mr. Ennor; and that Mr. Ennor has established a sufficient *primâ facie* case of an interruption of that water which, but for the interruption, would flow down to his land, and that he is, therefore, entitled to the protection of this Court.

The only remaining part of the case is, as to the water which rises between the south bank of the reservoir and the boundary wall between the two mineries. The water which rises there flows into three ponds. The defendant Barwell has endeavoured to show that these ponds are also mere collections of rain-water, that they are not springs, that the water collected there never flows into the Priddy minery at all in any certain or defined channel, and that it only flows now into the Priddy minery by reason of certain openings made by the plaintiff pending this dispute, by trenches cut by the plaintiff across the boundary wall into the ground of Chewton. I am of opinion, upon the evidence, that the water in these ponds is not mere rain and stagnant water, but is water supplied from the neighbouring hills, not merely along the surface but by percolation, into these ponds by a supply so copious as that when the present defendant used hand-pumps (which he began to use some years before the institution of this suit), the supply was continuous, and so great that these hand-pumps were not sufficient to convey all the water which accumulated in these ponds. A steam-engine was erected some few weeks before the present litigation took place; and it is perfectly clear, upon the evidence, that

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out of those three springs the action of this steam-engine threw up large quantities of water, which were continuously supplied by the springs—or percolation, which is another word for springs—which fill these ponds now in dispute. The natural inclination of the country would lead the water from these ponds into the Priddy minery. The defendant contends that there is not, and never was, any defined or certain channel connecting the supply of water in these ponds with the Priddy minery, and to a certain extent the defendant is quite justified in that contention. But when the matter is accurately looked at, the water rising to the surface of the ground in these ponds being close to the wall of the Priddy minery, the ground of the Priddy minery being below the level of the surface of these ponds, the very nearness of these ponds to the boundary wall, and especially in the case where many springs are collected, does not admit of there being distance sufficient to have furrowed or made a clear and defined channel, for the ground which forms the circumference of these ponds or springs is described by all the witnesses to be wet and swampy; and, the water rising in these ponds close to the boundary wall, it is not to be expected that any clear or defined channel could be formed. Every man who is familiar with the sources of springs in such situations, knows how often there is no defined channel near the source. But the law, as established by *Wright v. Howard*, is perfectly clear, that the owner of the land on which there are springs of water which would flow to the lower land of his neighbour, unless intercepted, has no right so to use the water while on his land as to diminish the quantity or affect the quality which would flow to his neighbour below. And I do not find it laid down in any case, if the very source of the water is so close to the boundary of his neighbour's wall that, from the nature of that source and at the very commencement of the flow of the water, it wells through

without forming any regular or defined channels, that the right of the proprietor upon whose land it would flow but for the interruption is in the least degree to be intercepted, any more than if it had come from a higher source and on steeper ground, where it might have a defined channel even at the very source. The conclusion, therefore, to which I have come, and which is quite satisfactory to my own mind, is, that by pumping away the water which thus collects in these ponds by pumps or steam-engines, the defendant is so dealing with the right of his neighbour to the water which would otherwise come to the Priddy minery, as that the owner of the Priddy minery, the plaintiff, is entitled to the protection of the Court against the abstraction of the water by any such system as the plaintiff has adopted. The principle, as established by *Wright v. Howard*, and recognised in all the cases, is, that although the water may still be used by the owner of the Chewton minery, it must be so used as not to diminish the quantity or affect the quality of the water which would find its way into the Priddy minery.

The questions in this suit have been very long and ably argued; but the assistance of this Court is invoked in aid of a legal right, and if either party wishes to bring an action, that is a liberty which I cannot refuse. All I can do is to grant an injunction in the following terms: The order of the 29th of June must be discharged; and then there must be an order for an injunction to restrain the defendant from diverting the water in the ponds or springs situated between the south wall of the reservoir and the boundary wall in the pleadings mentioned, so as to prevent the same from flowing into the Priddy minery; and from using any steam-engines or hand-pumps, and from any other manner of use of the water in the said ponds or springs, so as to diminish the quantity of water flowing into the Priddy minery; and also to restrain the defendant from diverting the course

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of the water which flows from certain springs on Stock's Hill, so as to prevent the water flowing in its natural course into the Priddy minery.

After some discussion as to costs, the VICE-CHANCELLOR said :—I retain more strongly the impression I had at first; that, upon a motion for decree, there having been partial success and partial failure on both sides, there ought to be no costs at all on either side. The motion to commit for contempt must be dismissed with costs. The motion to dissolve the injunction went entirely against the defendant, and I cannot say there has been any partial failure as to that motion on the part of the plaintiff. That motion, therefore, must be dismissed with costs.

McCULLOCH v. BLAND.

Nov. 8.

Bill by an executor to recover certain securities which the testator had handed to the defendant, his reputed wife, using words of gift, though the interest had been received by both jointly and applied to household expenses, and the testator had bequeathed to her a nearly similar sum—Dismissed with costs.

GEORGE McCULLOCH, a half-pay staff surgeon in the army, by his will, dated the 29th of October, 1859, after the payment of all his just debts, funeral and testamentary expenses, bequeathed to Agnes Bland, sometimes called McCulloch, the sum of 3000*l.* sterling, the interest thereof to be for her own sole and separate use during her lifetime, and while she continued unmarried; but in case she should marry, the principal sum with the accruing interest should come to the hands of his residuary legatee. The testator gave also to Jane Elizabeth Bland (otherwise McCulloch), daughter of the above-named Agnes Bland or McCulloch, the sum of 3000*l.* sterling, for her own sole and separate use for ever, the interest of the said capital sum of 3000*l.* to be then applied for her

maintenance and education, and thereafter as she might think proper, both as regarded principal and interest. The testator thereby appointed his brother, the plaintiff William McCulloch, and Alfred Peskett, to be his trustees in behalf of the said Agnes Bland, sometimes called McCulloch, and of the said Jane Elizabeth Bland, otherwise McCulloch, daughter of the said Agnes Bland, sometimes called McCulloch, to see that instrument, with his intention therein as regarded each of the above-named Agnes Bland, sometimes called McCulloch, and Jane Elizabeth Bland, otherwise McCulloch, fully carried out. The testator bequeathed to his brother the plaintiff a legacy of 1000*l.*, also a horse and carriage and certain pictures. He bequeathed to his sister a legacy of 500*l.*, and to Alfred Peskett, Esq., the sum of fifty guineas. He appointed his mother Mrs. Jane McCulloch his residuary legatee, "with the desire that his residuary estate should be afterwards left by her in her own and his name to charitable purposes."

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The testator, who had a wife living, in 1857 married the defendant. In the years 1857, 1858, and 1859, he purchased the following securities, transferrible by delivery:—

1857.	Nov. 20	225 <i>l.</i>	Spanish Three per Cents.
"	" "	200 <i>l.</i>	Turkish Stock.
1858.	April 7	600 <i>l.</i>	Ditto.
"	" 30	400 <i>l.</i>	Ditto.
"	" "	200 <i>l.</i>	Nova Scotian.
"	May 29	100 <i>l.</i>	East India Railway.
"	" "	200 <i>l.</i>	Brazilian.
"	" "	100 <i>l.</i>	Nova Scotian.
"	Aug. 30	255 <i>l.</i>	Spanish Three per Cents.
"	" 28	500 <i>l.</i>	New Indian Loan.
1859.	June 15	300 <i>l.</i>	Turkish.
"	" 30	100 <i>l.</i>	Ditto.

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The notes, coupons, and securities had been placed by the testator in the hands of his reputed wife, and were claimed by her as her own. The bill was filed by the executor and sole legal personal representative of the testator, alleging that the above securities formed part of the testator's property.

The bill alleged that, shortly after the death of the testator, the plaintiff had an interview with the defendant, when she stated to him "that she had in her possession the documents and securities for between 2000*l.* and 3000*l.*, which the testator had given her some time before, and that by his direction she had received the dividends upon them and paid them over to him, and she insisted on her right to retain them for her own use and benefit."

That the testator's estate would prove insufficient for the payment of his debts, and legacies, and testamentary expenses, unless the property before mentioned should be determined to form part of his estate.

The bill then prayed that the stocks and shares before mentioned, or, at all events, the 100*l.* East India Railway shares and the 500*l.* New Indian Loan, formed part of the testator's personal estate, and ought to be administered accordingly, and that the defendant might be ordered to deliver up the same to the plaintiff; and that account might be taken of all sums received by the defendant since the death of the testator, by way of interest, dividends and income of the said particulars aforesaid, and that the defendant might be ordered to pay to the plaintiff what, on taking such account, might be found to have been received by her, and that her interest under the will might be declared liable to make good to the testator's estate what should be found due from her. The bill also prayed for an injunction and receiver, and that the defendant might be ordered to pay the costs of the suit.

The evidence on behalf of the defendant was to the effect that the testator was in the habit from time to time

of investing money in Turkish, Spanish, Brazilian and Indian stock; but she did not know of any other investment made by him, except the Indian Railway shares mentioned in the plaintiff's bill. These she did not know the testator had purchased until two days or so before his decease, when he told her that they were in his pocket, and said, "Take care of them;" but, as he did not actually say they were for her, she was not satisfied that he intended them as a gift to her, and therefore took them out of his pocket and handed them to the plaintiff.

She further alleged, that generally the testator accompanied her into the city, and she having previously cut off the coupons, received the dividends and interest arising from or payable in respect of the stock and shares aforesaid during his life. That in April, 1859, she went alone into the City and received such dividends and interest. The said dividends and interest were not received by her by the testator's order, or for his use, but they were applied in payment of the joint expenses of the testator and herself. The defendant said that the documents, notes, coupons and securities had been deposited by her at Scott's bank, and she claimed to retain and use the said stocks and shares as her property. She said that a short time after her marriage the testator told her he would place in the Bank of England a sum of money—as she understood him 4000*l.*—in their joint names, that they would both have to sign the bank books, but the survivor would have the whole sum. A few days afterwards the testator said to her, "He had been thinking he would buy debentures with the money. They paid good interest, and in case of anything happening to him she would have no trouble. He would watch the market, and as he bought them he would give them to her, and she must keep them in her own possession, but the interest must be used jointly, more especially as he had not had very much money in this country." The de-

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fendant asked the testator if the debentures must not be made over to her. He replied, "No, they do not require to be made over to you, as they are like bank-notes. They are a gift, and no one can take away a gift." Accordingly, he from time to time bought various bonds or debentures and securities, Turkish, Spanish, Nova Scotian, Brazilian and Indian, and gave them to her with the coupons, also the receipts for the purchase-money. He never recalled the gift, and she (the defendant) had always retained such bonds and securities in her own possession, and she had herself from time to time cut the coupons off. The testator took her to the stockbroker's to enable her to receive the dividends, and in April, 1859, she went alone and drew the dividends.

The testator always expressed himself and acted as though the bonds and securities belonged to her; she had always kept them in a bundle tied up with red tape. On one occasion, when she had inadvertently left the said bundle on the table, he desired the servant to fetch her, the defendant, and then said to her: "Now, Agnes, if you won't or do not choose to look after your own property, I will not." A short time before his death, he said to her in the presence of two other servants, "Agnes, the dividends on your debentures are due, you shall go into the City to-morrow and get them." The defendant admitted that the plaintiff had shortly after the testator's death had an interview with her, and she stated to him to the effect that she had in her possession securities for between 2000*l.* and 3000*l.*, and she insisted on her right to retain them. The plaintiff apparently admitted and assented to her right to do so, for, after looking them over he remarked, "that they were as much hers as anything else, he (meaning the testator) ever gave her, but that she ought not to keep them in the house, but send them away for safety." As to the 500*l.* East Indian Loan, defendant said that it was transferable by delivery; that

the testator purchased the same in July, 1859, and on his arriving at home he gave the debenture into her hands, saying to her, "Do not say I never gave you anything." The defendant thenceforth retained the same in her possession, and she submitted that the legal rights and interest in the said New Indian Loan were not vested in the plaintiff, but vested in her.

The defendant, on cross-examination, alleged that, to the best of her belief, she always went with the testator to receive the dividends according to her desire. The money was received by the testator, and was applied in household expenses, and on two or three occasions he gave her the residue. It was sometimes paid into the Union Bank, to the testator's account.

Mr. *Bacon* and Mr. *W. Forster*, for the plaintiff, submitted that it was clear that the testator's intention was, that the defendant should have 3000*l.*, and his child 3000*l.* The attempt was, to set up a right to a large part of the testator's property as a gift. It was submitted there was no sufficient evidence of gift. In *Farquharson v. Cave(a)*, the testator told witnesses that the contents of a box, in which were title deeds, belonged to J., to whom he directed it to be delivered as it was shortly before his death. On the box being opened, there were found written directions to the wife and sisters of J., stating that they were entitled, and that this mode had been adopted to evade the legacy duty. But it was held that there was neither a gift *inter vivos* nor *donatio mortis causâ*.

Mr. *Malins* and Mr. *W. Cooper* appeared for the defendant, but were not called on.

(a) 2 Coll. 356; see also, *Deacon v. Colquhoun*, 2 Drew. 24; *Moore v. Darton*, 4 De G. & S. 518

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The VICE - CHANCELLOR said he thought there was evidence of a valid gift *inter vivos*, and no evidence the other way; it followed of course that the bill must be dismissed, but he did not think it was a case for dismissing it with costs. There would be no order as to costs, but the plaintiff's costs ought not to be allowed out of the estate.

Nov. 3rd.

TRYON v. THE WESTMINSTER IMPROVEMENT COMMISSIONERS.

Where trustees of certain lands held subject to a mortgage, by a deed conveyed their estate therein to other persons, and the mortgagee filed a bill against them and others to foreclose, alleging that he was advised the said deed was a breach of trust, to which the trustees demurred—the demurrer was allowed with costs.

THIS was a bill to foreclose a mortgage against two trustees (among other persons), who had conveyed away the lands in question. To this John Thomas and Lancelot Llewhelyn Haslope, the former trustees, demurred.

The bill alleged the title of the defendants, under certain Acts of Parliament. That, by an indenture, dated the 2nd of February, 1852, made between the Westminster Improvement Commissioners of the one part, and the plaintiff of the other part, in consideration of 10,000*l.* lent by the plaintiff to the commissioners, all and singular the messuages &c., &c., contained in a schedule thereto annexed, except so much as formed the area of Victoria Street, were granted, bargained, sold, released, and conveyed unto and to the use of the plaintiff, his heirs and assigns, subject to a mortgage therein mentioned.

That, by an indenture, dated the 26th of May, 1852, between the commissioners, demurring defendants and numerous other parties, power was given to the com-

missioners to grant lands in lieu of other bonds mentioned in the said deed.

That, by an indenture, dated the 26th of May, 1852, between the commissioners of the one part, and John Thomas and L. L. Haslope, the demurring defendants, of the other part, it was witnessed that, for securing the performance of the conditions of the bonds on the indenture of even date referred to, the commissioners did grant unto the said Thomas and Haslope and their heirs, all the lands &c., comprised in the first schedule, in respect to mortgages to which they were subject in the second schedule. To have and to hold the same, and all and singular other the premises thereby granted (subject nevertheless, so far as the same premises were thereby affected to the several mortgages, or agreements for mortgages mentioned in the second schedule, to the now stating indenture), unto the said John Thomas and Lancelot Llewellyn Haslope, and their heirs, to the use that it might be lawful for the said commissioners to exercise the powers thereafter given or reserved to them; and subject thereto, to the use of the said John Thomas, and Lancelot Llewellyn Haslope, their heirs and assigns, subject to the proviso for redemption thereafter contained.

And by the same indenture, the defendants, the Westminster Improvement Commissioners, did thereby covenant with the said John Thomas and Lancelot Llewellyn Haslope, their heirs and assigns, that, subject and without any prejudice to the right of them the said commissioners to alter, vary, or rescind all or any of the contracts entered into by them, the said commissioners, for the purchase or acquisition of the pieces of land and hereditaments mentioned and specified in the second part of the said first schedule to the now stating indenture, or any of them, which right it was therein stated was intended to remain exercisable, in as full and absolute manner as

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the same would have been if the now stating indenture had not been executed, and as and when the said premises should, whether in pursuance of any existing contract or of any new contract which might be entered into by the said commissioners, be conveyed to, or acquired by, and vested in the said commissioners, they the said commissioners should make and execute all such conveyances and assurances, and do all such acts as might be necessary, in order that the hereditaments so as last aforesaid conveyed to, or acquired by, and vested in the said commissioners might (subject, nevertheless, so far as the same premises were thereby affected, to the mortgages or agreements for mortgages mentioned in the said second schedule to the then stating indenture) be well vested in the said John Thomas and Lancelot Llewellyn Haslope, or the trustees or trustee for the time being of the then stating indenture, to the uses and in manner aforesaid, and in particular subject to the proviso for redemption thereafter contained.

And the said Westminster Improvement Commissioners did thereby also covenant with the said J. Thomas and L. L. Haslope, their heirs and assigns, that, subject and without prejudice to the right of the commissioners from time to time to enter into, rescind, alter, or vary any contract for the purchase or acquisition of any lands and hereditaments not included in the said first schedule to the now stating indenture but forming portion of the lands, which they were, by the said Westminster Improvement Acts, authorised to purchase or acquire for the purposes of the said undertaking, which right it was therein stated was intended to remain exercisable in as full and absolute a manner as the same would have been if the then stating indenture had not been made or executed, and as and when any such lands and hereditaments should be conveyed to or acquired by and vested in the said commissioners, they should, at the cost of the undertaking,

execute all such conveyances and assurances, and do all such acts as might be necessary in order that the hereditaments, so as last aforesaid conveyed to or acquired by and vested in the said commissioners, might be well vested in the said J. Thomas and L. L. Haslope, or the trustees or trustee for the time being of the then stating indenture, to the uses and in manner aforesaid, and in particular, subject to the proviso for redemption thereafter contained. And by the same indenture it was provided, agreed, and declared that if the said commissioners should in all respects perform the conditions of the bonds referring in manner in the said indenture of even date therewith to the same indenture of even date therewith at any time or times thereafter granted by the said commissioners as aforesaid, they, the said J. Thomas and L. L. Haslope, or the trustees or trustee for the time being of the then stating indenture should, at any time after the complete performance of the conditions aforesaid, re-convey to the use of the said commissioners and their successors, or as they should direct, or, as the case might be, remise and discharge the said premises thereinbefore granted or intended or covenanted so to be, and every part thereof free from incumbrances by the said J. Thomas and L. L. Haslope, or the trustees or trustee of the then stating indenture.

And by the same indenture it was provided and thereby agreed and declared that the said J. Thomas and L. L. Haslope or other the trustees or trustee for the time being of the then stating indenture should have full liberty, if in their or his discretion they should think fit so to do, to re-convey, release, and discharge all or any of the said hereditaments thereby granted or covenanted or intended so to be respectively, or any other hereditaments or funds which might have become vested in them for the purposes of the security, of and from the security intended to be made by the then stating indenture, and that either with

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or without requiring or receiving any substituted security in lieu of the security to be so relinquished by them.

The schedule to the last stated indenture contained, among others, the hereditaments comprised in the hereinbefore stated indenture of mortgage of the 2nd day of February, 1852, and also the said indenture.

That by the Act of 1853 (Westminster Improvement Act of 1853), the agreements and powers in the deed of settlement and indenture of mortgage of the 26th day of May, 1852, were confirmed except as thereby altered.

The bill then set out the dealing of the commissioners with the property and numerous proceedings that had been instituted against them.

The 61st paragraph was as follows:—"By an indenture, dated the 26th day of December, 1857, between the said J. Thomas and L. L. Haslope of the one part, and the Westminster Improvement Commissioners of the other part, reciting, among other things, that the last named defendants had determined, in exercise of the power and discretion conferred on them by the said indenture of the 26th day of May, 1852, to re-convey to the Westminster Improvement Commissioners the hereditaments and premises which were then vested in them for the purposes of the said recited mortgage security in the manner therein-after expressed, they the said John Thomas and Lancelot Llewellyn Haslope, in pursuance of their said determination and in exercise of the powers and discretion conferred upon them by the said thereinbefore recited indenture of the 26th of May, 1852, and of all other powers and authorities enabling them in that behalf, and in consideration of the premises and for the nominal consideration therein mentioned, did, by way of assurance only but not of warranty, grant, release, and convey unto the said Westminster Improvement Commissioners, their successors, and assigns, all and singular the pieces of land and hereditaments which were granted unto the said John Thomas

and Lancelot Llewhelyn Haslope, and their heirs, by the said thereinbefore in part recited indenture of mortgage of the 26th of May, 1852, or were expressed so to be (except certain of them not included in the said indenture of mortgage of the 2nd of February, 1852, which had been previously re-conveyed to the Westminster Improvement Commissioners), and all and singular other the lands and hereditaments whatsoever, which were then vested in them for the purposes of the said security, with their appurtenances. To hold the said piece of land, hereditaments, and all and singular other the premises thereby granted, released, and conveyed, or intended so to be unto and to the use of the said Westminster Improvement Commissioners and their successors and assigns for ever. This indenture was not executed by the Westminster Improvement Commissioners, and the plaintiff is advised that if it was effectual for any purpose it was a breach of trust on the part of the defendants, John Thomas and Lancelot Llewhelyn Haslope, and that they are necessary parties to this suit."

It was stated at the Bar, but not proved, that a bill had been filed to set aside the indenture of the 26th of December, 1857.

The bill prayed for the ordinary foreclosure decree.

Mr. *Bacon* and Mr. *Lewin* for the demurring defendants.—It appears from the allegations in the bill that there is no estate in the demurring defendants, and unless some case was made against them for breach of trust, and some relief prayed, they were clearly unnecessary parties to the suit. The bill asked no relief whatever against them. It was submitted, therefore, that the demurrer must be allowed.

Mr. *Craig* and Mr. *J. Pearson* for the bill, contended that there was enough on the bill to show that the demurring defendants were necessary parties.]

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First, it was alleged in the bill that the plaintiff was advised the defendants had been guilty of a breach of trust, and had exceeded their powers under the deed of the 26th of May, 1852. What constituted a breach of trust was here a matter of law, and the averment could not be more positive.

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Secondly, it was submitted that the deed of December, 1857, did not transfer the whole estate from the demurring defendants.

Thirdly, it was contended that a suit had been instituted in this court against these defendants for a breach of trust, which had been registered as a *lis pendens*.

Judgment.

THE VICE-CHANCELLOR:—

Unless there is something to show that these defendants had committed a breach of trust, they are unnecessary parties.

By the indenture of December, 1857, they are discharged from the trust, unless a breach of trust had been committed, but the plaintiff does not venture to allege that fact, but simply states, that he is advised a breach of trust has been committed. Possibly he may have been so advised, but that is much too vague an allegation to support the bill. It was quite consistent with this averment that no breach of trust had been committed, but that the plaintiff had been improperly advised.

In the present frame of this suit, there is no ground for making these demurring defendants parties, and the demurrer must be allowed with costs, with liberty to the plaintiff to amend by striking out their names.

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November 24.

THE bill alleged that Joseph Chune, in the month of November, 1857, and shortly before the date and execution of his will, the said testator being in his last illness, from which he never recovered, and having the fear of death before his eyes, stated to the defendant George Chune, that he, the testator, was desirous of making a provision for the plaintiff otherwise than by his will, and that he intended, as the defendant George Chune already knew, to appoint and make him the said defendant one of the executors and residuary legatees under his will, in the faith and on the understanding that he the said defendant should and would apply a competent part of the estate of the said testator in carrying his said wishes in favour of the plaintiff into effect, and the defendant promised to do so.

5. That the said testator then, on the faith of the said promise, directed the said defendant George Chune, as soon as might be after his decease, to invest the sum of 500*l.* out of the first assets of the testator which should come to the defendant's hands in the purchase of a life annuity for the benefit of the plaintiff, and the said testator then signed and delivered to the defendant a promissory note for 500*l.*, which sum was thereby made payable to the defendant as trustee for the plaintiff, in order that the defendant might retain and apply the amount or proceeds thereof in the purchase of such annuity for the plaintiff as aforesaid.

6. That the defendant George Chune thereupon promised to invest and apply the said sum of 500*l.* out of the first assets of the said testator that should come to his hands for the benefit of the plaintiff, and on the faith of

A testator gave a promissory note to G., saying, he wished to provide, otherwise than by will, for the plaintiff; and afterwards made his will, appointing G., with others, his executor, and to whom, after payment of legacies, he bequeathed a moiety of his personal estate. G. having made some payments on account to the plaintiff afterwards denied her title. *Held*, he was a trustee of the note for the plaintiff.

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such promise, and with a view to the due fulfilment thereof, the testator delivered to the defendant the promissory note, and shortly afterwards executed his will, appointing such defendant his executor and residuary legatee.

The bill alleged that the defendant frequently promised the testator to perform the said promise.

On the 23rd of December, 1857, the defendant wrote to the plaintiff, as follows:—

“ Coalbrookdale, December 23rd, 1857.

“ My dear Mrs. Lloyd,—It occurred to me that you may be very glad to have a little money on my late lamented brother's account. Although I am very short, and it would be a considerable time before any is payable, I will most willingly assist you to some to meet present necessities. I think, perhaps, if you were to have £5, and Mary the same, but I will leave it open for you to say. The bearer shall wait for an answer, or call again; and, upon hearing from you, I will send it. I thought it better to write than to send any messages by my son. With kind love,

“ Yours very affectionately,
“ GEO. CHUNE.”

Some further correspondence took place; and, on the 3rd of February, 1860, the defendant wrote to his own solicitor a letter as follows:—

“ Coalbrookdale, February 3rd, 1860.

“ My dear Sir,—In respect to my late brother's intentions as to an annuity for Miss Lloyd, they were that she should have one purchased to the amount of 20*l.* or 25*l.* per year, as the case may be, in respect to his property holding out, to do this, and to secure me for the money to be paid for such purchase, he gave

his note of hand payable to myself for 500*l*. You are aware, the difficulty arises how this is to be arranged in consequence of the delay in settling family affairs, which I am most anxious and desirous to have brought to a close.

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“ I am, my dear Sir, yours very truly,

“ GEO. CHUNE.

“ Jonⁿ. Scarth, Esq., Shrewsbury.”

In August, 1859, the plaintiff was, for the first time, informed by Mr. Luckock, who had renounced, that the testator had, by a previous will, given a legacy to the plaintiff of 500*l*., and that the testator afterwards caused some security to be prepared by his solicitor, and to be given to the defendant George Chune for the benefit of the plaintiff in lieu of the said legacy, which was in consequence revoked, and the defendant George Chune was aware of these circumstances when he made the aforesaid promise and accepted the aforesaid trust for the benefit of the plaintiff.

The plaintiff thereupon caused an application to be made by her solicitor to the defendant to produce the said note for 500*l*., in reply to which the defendant wrote as follows:—

“ Coalbrookdale,

“ Messrs. C. & S. Craig,—In reply to yours of the 12th instant, I have no document or security whatever of my late brother's in favour of Miss Mary Lloyd, therefore nothing to furnish for your inspection.

“ I am, Gentlemen,

“ Your obedient servant,

“ GEORGE CHUNE.”

The plaintiffs thereon wrote requiring to know the nature of the authority by which the defendant had paid

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 —
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the sum of 6*l.* 5*s.*, as the interest on 500*l.*, due from the testator's decease.

On the 29th of August, 1859, the defendant replied as follows:—

“ Coalbrookdale, August 29th, 1859.

“ Messrs. Craig,

“ Gentlemen,—In reply to yours of the 24th instant, I have nothing whatever to disclose in the matter you refer as to any trust or obligation created by the late Mr. Joseph Chune in favour of Miss Mary Lloyd. There is no document or provision or name mentioned in any way whatever. What I paid Miss Lloyd was my own voluntary act.

“ I am, Gentlemen,

“ Your obedient servant,

“ Shrewsbury.”

“ GEO. CHUNE.

The defendant paid the plaintiff quarterly the sum of 6*l.* 5*s.*

The bill was ultimately filed, praying that it might be declared, the defendant George Chune was and became a trustee of the said 500*l.* note, and of the testator's estate to the extent of 500*l.*, with interest thereon for the plaintiff; and also, if necessary, that the testator's estate might be administered in the Court.

The defendant George Chune put in his answer, and, in paragraphs 6 and 55, deposed as follows:—

“ 6. The testator, during his last illness, which preceded his death, and shortly before he made his will, had a conversation with me about the plaintiff, and told me that in case he died he should like the plaintiff to have an annuity of 20*l.* to 25*l.* for her life, but that he should not like to leave it her by his will, and asked me to see his wishes in this respect carried out, and I promised him that I would do so, if he left property sufficient or available for the purpose, of which I stated to him, I had con-

siderable doubt; and it was at the same time arranged between us that, as I should have no lawful warrant for doing this as it was not mentioned in his will, he should give me a promissory note for 500*l.* apparently for value, which was the amount estimated between us as the sum requisite to provide such annuity for my indemnity, that I might claim thereunder against his assets as a debt, which I might expend in purchasing and providing an annuity for the plaintiff in accordance with the said testator's wishes."

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"55. I submit and insist that no trust was created by the testator in favour of the plaintiff of the said promissory note, and that plaintiff is not of right entitled to any provision out of his assets, either as creditor, legatee, cestui que trust, or otherwise, and that she is not entitled to any account of his estate and effects, or of his debts, and that the discovery of his estate and effects, or whether he was in partnership with me or not, is wholly immaterial and unnecessary for the purpose of establishing in her favour that I am trustee of the said note for her, or that she is entitled to any provision out of his assets; and I therefore decline to set forth the particulars of the estate of the said testator, or of my dealings therewith, required by the interrogatories filed on behalf of the plaintiff in this cause."

Mr. *Malins* and Mr. *Druce* for the plaintiffs, contended that there was a clear gift of the 500*l.* note to the plaintiff, and that the defendant was a trustee to that amount of the testator's assets which had come to his hands.

Argument.

[*Dawson v. Kearton* (a) was cited.]

Mr. *Ffooks* for the defendant.—There was nothing to show that the testator had created any trust in favour of the plaintiff. The defendant did not admit assets.

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Judgment.

THE VICE-CHANCELLOR:—

The payment of this bond is an obligation which the testator has fastened on his assets for the plaintiff's benefit. The defendant held the note for her benefit, and thereby became a creditor on the assets to the amount of the note as a trustee for the plaintiff. He contended that he held the money as an indemnity to himself; for the payment he was authorised to make to the plaintiff for her use. But, assuming that to be shown, it did not really alter his position.

It was true that it was a debt voluntarily incurred, but incurred, as the defendant had in this Court been compelled to admit, for the plaintiff's benefit; it was clear, therefore, whether the defendant admitted it or not, he was a trustee for the plaintiff.

With regard to the costs, as he had denied the plaintiff's title, and driven her into this Court to establish her right, which she had succeeded in doing, the defendant must pay the costs of the suit.

As the defendant does not admit assets, there must be a declaration that the promissory note was held by the defendant. There must be the usual administration decree, with liberty to the defendant to go in and prove against the testator's assets for the amount of the note, and for that purpose to have liberty to use the defendant's name.

The plaintiff's costs must be taxed, and the other executor having renounced, to be paid by the defendant.

1860.

LIPSCOMBE v. PALMER.

Nov. 8th.

IN this suit, by consent, a decree had been taken referring the matters in dispute to Mr. Craig, with liberty to either party to apply to make the award a rule of Court. The terms of the decree were as follows:— That the costs of the suit and of that application, and of that reference, and consequent thereon, were to be in the discretion of the arbitrator; also that, by the like consent, either of the parties were to be at liberty to apply to the Court to have the award to be made in pursuance of that order of reference made an order of Court.

Where a decree sanctions a reference to arbitration, and directs that either party may apply to make the award a rule of Court, such application should be made on notice.

On the 24th of May, 1860, Mr. Craig made his award, by which, *inter alia*, he found a sum of 613*l.* 8*s.* due to the plaintiff, and directed that the defendant should pay to the plaintiff his costs of the said suit, up to and including the costs of the application upon which the order of reference was made, and including the costs of the said order itself; but not including any costs of the said suit already incurred since the date of the said order, if any such there might be; and that such costs, so to be paid by the said defendant, should be taxed by the proper taxing-master of the said Court.

Each party was to share the expense of taking up the award. On the 12th of September, the defendant paid the amount found due.

Mr. *Bilton* now moved that the award be made an order of this Court, pursuant to the decree. Argument.

Mr. *Fischer*, on behalf of the defendant, opposed the motion as unnecessary and vexatious. The defendant

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Argument.

had paid the amount found, and, for aught that appeared, might have paid the costs without taxation. At all events the defendant need not have served a formal notice of motion.

[*Russell on Arbitration* was cited.]

The question having been raised, whether the application to make an award an order of Court ought to be made *ex parte*, his Honour directed an inquiry as to the practice. The note in the Registrar's office, and the reply to his Honour by Mr. Metcalf as to the practice, is as follows:—"There must be an affidavit of service or a consent, unless the award contains a provision that either party may move to make it an order of Court without notice."

Judgment.

THE VICE-CHANCELLOR:—

Where a decree, after sanctioning a reference to arbitration, contains a direction that either party may apply to the Court to have the award made an order of Court, the application should be upon notice; and for this reason, that, by notice of such application, the other side has an opportunity of stating any objection which he may entertain to the award. Whereas, if such a motion might be made *ex parte*, an order might be obtained suddenly, and the award might be made an order of Court, without giving an opportunity to the other side to state objections.

Therefore, it was the duty of this plaintiff to have given notice of his intention to apply to the Court for an order to make this award an order of Court. The motion being a proper motion, neither party should have any costs, but each party must bear his own costs. If affidavits had been filed, it might have been otherwise. There is a simple case of a motion upon notice, to make an award an order of Court, under liberty reserved in the decree; and where it is so reserved, my opinion is

that the motion should be upon notice, and not *ex parte*. The contrary practice might in many cases lead only to litigation.

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v.
PALMER.
Judgment.

GODDARD v. WHYTE.

Nov. 16th.

THIS bill was filed by John Goddard and Arthur Finch, for the purpose of obtaining a declaration that the plaintiffs, who were sureties of one Samuel Hallett, were entitled to certain securities, which had been given to John Sullivan Ide, the holder of a promissory note, which had been dishonoured, and on which Hallett was liable. The bill stated that, prior to March and April, 1857, George W. M'Dowell and Samuel Hallett carried on business as bankers (with two other partners), at Hornellsville, in the State of New York. The style of the firm was "Hallett & Company." In March and April of that year, G. W. M'Dowell made two promissory notes for 3000 dollars, each payable four months after date to the order of Truman Warner, at the Metropolitan Bank of New York. The notes, before they became due, were indorsed in the name of Samuel Hallett & Co., to the Hornellsville Bank, by whom they were indorsed to the defendant Ide. On the notes becoming due, Ide presented them for payment at the Metropolitan Bank of New York, when they were dishonoured. Notice of dishonour was immediately given by Ide to G. W. M'Dowell, who thereupon agreed to give him security for the amount due. Accordingly, by an indenture of mortgage, dated the 5th of October, 1857, and duly executed according to the law of the

The holder of a dishonoured promissory note, who had obtained from the maker security—decreed to deliver up such security to a surety who had become liable by the default of the principal, and had paid the amount into court.

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—
Statement.

State of New York, between G. W. M'Dowell of the one part, and John Sullivan Ide of the other part, he, the said G. W. M'Dowell, in consideration of the sum of 6000 dollars, thereby expressed to have been paid to him, sold, granted, and conveyed to Ide certain parcels of land as a security for the payment of the 6000 dollars and interest, at ninety days date from the execution of the deed. The indenture also contained a power of sale in case default were made in payment. The deed was executed by G. W. M'Dowell, and acknowledged by him before a justice of the peace, and in January, 1858, was registered in the office of the clerk of the county. The deed was then delivered to Ide. Ide being desirous of enforcing payment of the notes, indorsed them to a gentleman in Paris, who indorsed them over to the defendant Whyte. On the 7th of April, 1858, Whyte commenced an action against Hallett, who was then in London, who appeared to the action, and traversed all the allegations, ignoring the whole transaction. Both plaintiff and defendant obtained a commission for the examination of witnesses in America. On the 13th of October, 1858, Whyte caused Samuel Hallett to be arrested on a *capias* alleging he was about to quit England. The plaintiffs in these proceedings became Hallett's sureties, but he shortly after left England for America, thereby rendering them liable. On the 19th of February, 1859, Whyte obtained a verdict against Hallett, and on the 16th of March, 1859, entered up judgment in the action for 1631*l.* 8*s.* 1*d.* for damages, interest and costs. For this amount the plaintiffs were liable.

On the 26th of April, 1859, the plaintiffs' solicitor inquired of the solicitor of Whyte whether, if the plaintiffs paid the amount of the judgment, his client would give credit for the amount of the mortgage security. On the 29th of April, the solicitor of Whyte writes as follows:

"My client has nothing whatever to do with the mort-

gage security you refer to, and I believe the mortgage held is against Mr. M'Dowell, the alleged mortgagor, for some other unsatisfied claim. I cannot settle on any other terms than payment of the judgment debt and costs of the present proceedings."

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GODDARD
v.
WHYTE.
—
Statement.

The plaintiffs thereupon filed this bill against Whyte and Ide, and against Hallett and M'Dowell, who were out of the jurisdiction. The bill alleged that the firm of Hallett were liable, and claimed to have the benefit of the mortgage security of the 5th of October, 1857.

John S. Ide, by his answer, said, that the indenture of October, 1857, was delivered by G. W. M'Dowell as an escrow to be held by him, J. S. Ide, only until a negotiation with a third party of the name of Thompson should be effectually carried out. The indenture was still in his hands, but he made no claim on it, save as aforesaid. He said that he was informed by G. W. M'Dowell, and he believed that G. W. M'Dowell had informed S. Hallett of all the circumstances connected with the promissory notes. Whether the plaintiffs were entitled to the mortgage security or not, he submitted to act with reference thereto as the Court should direct, and he claimed to receive the amount of the two notes and interest, and his expenses in relation thereto. He had not sold or disposed of the property.

The bill was taken *pro confesso* against S. Hallett and G. W. M'Dowell.

Mr. Bacon and Mr. Chapman Barber appeared for the plaintiffs. Argument.

Mr. Malins and Mr. Bagshawe, jun., appeared for the defendant Whyte.

Mr. Greene and Mr. Burt for the defendant Ide.

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Judgment.

THE VICE-CHANCELLOR:—

The plaintiffs have paid into court the amount due on Whyte's, or rather on Ide's, claim on these promissory notes. By the law of this Court, a surety who satisfies the debt for which he is liable, is entitled to have from the creditor whose debt he pays the securities which such creditor has obtained from the debtor; and if such securities are not voluntarily given up, it is the right of the surety to come to this Court to have such security delivered up.

In this case the plaintiffs have been put to great expense; they had been compelled to pay the money into court as the terms of stopping the action at law, and have clearly established their right to have the securities in the possession of the defendant Ide.

This was the object of the suit, and they are therefore entitled to the costs, even if the conduct of the defendants had been more straightforward than it was. The great expense of the suit has arisen from the conduct of the defendants.

The plaintiffs are therefore entitled to a decree, that their costs should be taxed and paid out of the fund in court. There must be a declaration that they are entitled to have the mortgage security held by Ide delivered up to them, and that Ide is entitled to the residue of the fund in court, after payment of the plaintiff's costs in full satisfaction of his claim upon the notes. It is unnecessary, in this view of the case, to make any order as to the liabilities between the defendants Ide and Whyte.

The bill having been taken *pro confesso* against the defendants M'Dowell and Hallett, the plaintiffs are entitled to a declaration that they are entitled to recover against such defendants the full amount of principal, interest, and costs, and to a decree for payment—the

amount to be certified by affidavit—and that all proper assurances should be executed.

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v.
WHYTE.
Judgment.

BLUCK v. GALSWORTHY.

Nov. 26th.

THIS was a summons on the part of the plaintiff, adjourned into court, calling upon the defendant Thomas Lacy to produce for inspection the documents specified in the second part of the second schedule to his answer to the bill.

Communications made before suit by a client to his solicitor, concerning the matter in dispute, are not generally privileged; but, advice given confidentially to a client, upon such statements is within the rule.

On the 22nd of May, the plaintiff took out a summons against both defendants, for the production of the documents in the first and the second schedules to their answer.

At the hearing of the summons, the defendants objected to produce the documents in the second part of the second schedule, as privileged; the chief clerk allowed this objection, and made an order for the production of the others. The bill was subsequently amended, and a summons taken out for the production of the same documents, which was also refused.

The bill was filed by James Bluck, against the defendant E. H. Galsworthy, the secretary, and Thomas Lacy, the solicitor to the Family Endowment Society, and it prayed that an account might be taken of what was due to the society from the estate of the Rev. John Bluck at his decease, on certain alleged mortgages. The bill also asked for an account of all monies due to the testator on certain policies received by the secretary, on the said securities and monies received.

On the 9th of May, the defendants filed a joint and

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v.
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—
Statement.

several answer, with two schedules, the first specifying the documents in the possession of the society, and the second, those in the possession of Lacy. This latter was divided into two parts, the second part of which set forth documents which the defendant contended were privileged. In his answer he deposed as follows:—

“All the said documents set forth in the second part of the said second schedule were and are respectively private and confidential statements and communications between the said society and myself as their solicitor, or between myself and counsel in the ordinary course of professional business, and I accordingly object to produce the same, as being privileged.” (a)

(a) The second part of the second schedule was as follows:—

1852. Bluck's loans. Draft statement for the opinion of Mr. Daniell.

„ Copy thereof.

1853. Draft instruction for security and bill.

„ *Bayley v. Ellis*. Draft instructions for bill.

„ Copy thereof.

1856. *Bayley v. Bluck*. Draft instructions to amend bill.

„ Copy thereof.

„ Draft instructions to amend bill.

1859. The Rev. John Bluck deceased. Case for the opinion of Mr. Daniell.

„ Copy thereof.

„ Draft case for the opinion of Mr. Daniell.

„ Copy thereof.

„ Draft supplemental statement.

„ Copy thereof.

„ Conference with, and opinion of Mr. Daniell.

1859. *Bluck v. Galsworthy*. Draft instructions for answer.

„ Copy thereof.

April 19. The Rev. J. Bluck deceased. Draft opinion of Mr. Daniell.

„ Copy thereof.

Sept. 19. *Bluck*. Copy opinion of Mr. Daniell.

„ *Re John Bluck*. Copy correspondence; commencing March and ending 15th December 1859.

1860. *Bluck v. Galsworthy*. Copy letters referred to in instructions for answer.

„ *Bluck v. Galsworthy*. Draft statement as to policy in United Kingdom Office.

„ Copy thereof.

April 10. Norwich Union policy. Statement for counsel.

„ *Bluck v. Galsworthy*. Draft statement as to proposals and policies.

„ Copy thereof.

Mr. *Bovill* for the plaintiff, contended that a solicitor might protect himself against production, when the client would be bound to produce.

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BLUCK
v.
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Argument.

Many of the documents had come into the defendants' possession as mortgagees, and the mortgages being redeemed by the policies falling due on the testator's death, there was no ground on which these were protected.

It was not asked that documents existing *post litem motam* should be produced, but the bill was only filed recently.

[*Beadon v. King(a)*, *Greenlaw v. King(b)*, *Wynne v. Humberston(c)*, were cited.]

Mr. *Rodwell*, for the defendants, submitted that the answer did not admit the redemption of the mortgages. The answer averred that the policies were wholly void in consequence of the untrue statement on which they had been obtained. There was no admission that the defendants were trustees for the plaintiff or his testator. Therefore, that ground failed.

Secondly, the old distinction between the privilege of the solicitor and the client was at an end: *Pearse v. Pearse(d)*.

1838-1860. Rev. John Bluck.	8th Nov. 1859, and
Copy, extracts from	9th, 10th and 13th
diary.	April, 1860).
„ Letters from Mr. Daniell to Mr. Lacy (11th April, 1859).	1838-1860. Six letters from John Cazenove to Mr. Lacy (dated 29th Dec. 1851, 5th Sept. 1856, 20th Feb., 21st April, 24th April, 1857, and 30th June, 1852).
„ Seven letters from Mr. Galsworthy to Mr. Lacy, dated (27th Nov., 1858; 23rd March, 25th June,	

(a) 17 Sim. 34.

(b) 1 Beav. 137.

(c) 27 Beav. 421.

(d) 1 De G. & S. 12. See *Glynn v. Caulfield*, 3 M. & G. 463; *Thompson v. Falk*, 1 Drew. 21; *Manser v. Dix*, 1 K. & J. 451.

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 —
 Judgment.

So far from there being a friendly relation between the parties in 1852, the defendants sued out sequestration on a judgment they had obtained.

[*Taylor on Evidence* was also cited.]

THE VICE-CHANCELLOR :—

The rule sanctioned by many decisions is, that communications and statements made by a client to his confidential adviser touching the matter in dispute, before any suit has been instituted, are not entitled to protection, unless under some extraordinary circumstances. But advice given in writing to a client confidentially upon that statement, is a document the production of which will not be compelled. It is unnecessary to enter into any statement of the principles and grounds of that distinction; it is enough, that such is the rule of the Court by which I am bound. Therefore, all those documents, including letters anterior to 1859, (among which were included several copies of instructions for counsel, but no counsel's opinions), must be produced. The others are privileged by the rule of the Court. The plaintiff's costs to be costs in the cause. The defendants to have no costs of the appeal summons.

MARRIOTT v. THE ANCHOR REVERSIONARY
COMPANY (LIMITED).

1860.

Nov. 20th,
21st, & 22nd.

THIS bill was filed by W. A. Marriott against the company and its trustees, and it prayed as follows:—

“1. That it may be declared, that the defendants, the Anchor Reversionary Company, ought to be charged with the value of the said steam-ship at the time of, or at a reasonable time after their taking possession thereof.

“2. That an account may be taken of what, if anything, is due to the defendants for principal and interest in respect of the said mortgage; but, in taking such account, that the defendants may not be allowed to charge the plaintiff with any losses consequent on the trading by them with the said vessel. The plaintiff hereby offering to pay to the defendants what, if anything, shall be found due from the plaintiff on the said security; but if, on taking such account, it shall appear that a balance is due to the plaintiff, that the defendants may be decreed to pay such balance to the plaintiff, with interest at 5l. per cent., from the time when the same was due to the day of payment.”

The mortgagees of a steam-ship, who, against the consent of the mortgagor, employed her in trade, whereby they lost large sums, and afterwards sold her by private contract, without notice, to the mortgagor, for less than the amount of the mortgage debt, charged with her value on taking possession.

Whether a mortgagee of a ship is bound to sell her, or whether he may use her as a prudent owner would do—*quære*.

The bill also prayed for an injunction to restrain execution on a judgment which the defendants had obtained as a security for what should be due, and also for the usual accounts and inquiries.

The bill alleged, that, in July, 1858, the plaintiff applied to the defendants for the loan of 1000l., in order to do certain repairs to the “Orwell” steam-ship.

The said company consented to grant such loan, and on the 24th day of July, 1858, advanced the said plaintiff the sum of 1000l. on his executing to the company the usual shipping mortgage comprised in a printed form, and

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also a certain indenture which provided for the repayment of the said 1000*l.* by instalments, and which the company had ready prepared for that purpose, together with the mortgage of the ship. The plaintiff effected an insurance for a year in 1000*l.* on his own life, and deposited with the company a lease of a house in Fleet Street, but these other securities were not mentioned in the bill. The loan was to be repaid in two years, by instalments of 150*l.* each, and was in the meanwhile to bear interest at 10*l.* per cent.

On the 28th of October, 1858, the plaintiff paid the first instalment of 150*l.*, but being unable to pay the second in due time, the company commenced an action against him on the covenant in the deed; but the plaintiff, on the 30th of May, 1859, having paid a further sum of 100*l.*, the action was ultimately settled by the plaintiff consenting to give judgment for 1200*l.*, which was to stand as a security for what, on investigation, should be found due, and to pay the company's costs between solicitor and client.

The plaintiff expended the 1000*l.*, with other sums, in effecting the necessary repairs, and supplied the vessel with a new and powerful boiler, which alone cost nearly 800*l.* He subsequently employed the vessel in conveying goods and passengers between London and Ipswich until October, 1858, and again during the months of June and July, 1859, but finding such traffic unprofitable, he determined to discontinue the running of the vessel and to sell the ship, and with a view to such sale, withdrew the ship from the station and laid her up at Blackwall, where she was painted by the captain. The plaintiff, thereupon, opened a negotiation with the Waterman Company, who had boats on the station, for the sale of the vessel to them. On the 20th or 22nd of July, for there was some doubt about the exact day, the plaintiff being again in arrear, the defendant took possession of the vessel,

and, acting on the advice of the captain and Mr. Horne, the auctioneer, immediately determined to resume the traffic between London and Ipswich, which the plaintiff had finally abandoned, and commenced running her between London and Ipswich. The company advertised the ship for sale for the 3rd of August, 1859.

The particulars of sale stated that the said steam-ship was fitted with "two steam boilers, one new last July," (1858) whereas the vessel was, in fact, fitted with one large and powerful boiler, new in July, 1858, instead of two smaller ones of which one only was new.

The fourth condition provided "That the bill of sale and transfer of the vessel shall be prepared by and at the expense of the purchaser; and, on the completion of the purchase, the purchaser will become entitled to the engagement that has been entered into with the captain, engineer, and crew of the vessel to carry passengers between London Bridge Wharf, Ipswich, and Walton-on-the-Naze, up to the 5th of October. The purchaser shall enter into an undertaking with the vendors to fulfil the engagements and to discharge the obligation created by the issue of return tickets."

The plaintiff, on hearing of the intended sale, wrote to the defendants, stating that the boiler was not included in the mortgage. He also strongly objected to the particulars of sale as inaccurate. In consequence of this remonstrance the sale was postponed till the 12th of August, and in the mean time a correspondence took place between the respective solicitors; the plaintiff's solicitor requested to have copies of the deeds which the plaintiff had executed, and of which he had no copies, which the defendant's solicitor refused to furnish, alleging that the company stood on their right as mortgagees not to produce the deeds until paid off. On the other hand, the defendant's solicitor sent the particulars and conditions of sale to the solicitor of the plaintiff, with a request to have

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any inaccuracy set right. The plaintiff's solicitor, in reply, refused to interfere in the matter, and left the company to act on their own responsibility. Before the sale took place, the plaintiff himself wrote to the defendant's solicitor, stating he had no objection to their selling the boiler if they left a sufficient margin.

On the 12th of August, the vessel was offered for sale, having been running the whole time, and, no offer having been made, was bought in by the vendors for 950*l*. It was in evidence that a person in the sale-room inquired whether she could not be sold without engagements, but was told by the auctioneer she must run until the 5th of October. He made no bidding. It was also sworn by the auctioneer that he corrected the mistake in the particulars of sale as to the boiler. On the 13th of August, the plaintiff addressed to the company the following letter:—

“August 13th, 1859.

“Dear Sir,—I am communicating with some parties at a distant part of England, who I believe want a similar class of vessel to the “Orwell” for the station. It would be well if (as you did not sell yesterday) she was to await the result of this communication. As a matter of friendly advice, I should still say to you—Don't run her, but put her into dock (Victoria is the cheapest), and discharge all hands but one to take care of her. The best man for that would be Leonard Daldry, who was a seaman on board her when you took her. He can be relied on to take charge of everything. As to any agreement existing in favour of captain and crew up to the 3rd of October, that is all nonsense; there is none to my knowledge or with my sanction, and therefore none that can hold good a moment. They may or may not have agreed among themselves to certain things, but they are or were all—from captain downwards—only weekly servants, at a weekly rate of pay, able to give and liable to receive a

week's notice. In fact, the captain himself has given me notice some short time previously to your seizure, that he wished his substitute to be provided, thus clearly showing he did not consider that he was engaged until October the 5th. The only document that can exist, so far as I know or consented to, was the ordinary form of shipping articles, which is compulsory to be entered into for Government registration purposes, and which has nothing to do with any such agreement as alluded to. You have been misled by interested parties into a great error. Now, take my advice, you will find it best, depend on it; it is to serve an end they have in view, and not your interest, rely on it.

"Yours truly,

"WILLIAM MARRIOTT."

The company continued to employ the vessel in the same trade until the 17th of September, when they gave the captain and crew a week's notice, and discharged all hands a few days afterwards. During their employment of the ship, she sustained considerable damage from being engaged in racing with other vessels, and one of the main frames of the engine was broken. On the 3rd of October, 1859, the company sold her to Messrs. Pearson, Coleman, & Co., for 750*l.*, without, as the plaintiff deposed, notice to him of the sale until the contract was completed.

The company subsequently sent to the plaintiff an account, in which the balance against him was 454*l.* 19*s.*, of which, according to the defendant's evidence, about 163*l.* was due for unpaid principal, interest, and costs, and the residue the trading losses, and for which they instructed the sheriff to arrest the plaintiff. In the account rendered, the auctioneer's fees were put down as 21*l.* 16*s.* 8*d.*, and the company's solicitor's costs at 42*l.* 11*s.* 8*d.* The expenses connected with the ship were stated in the account at 473*l.* 11*s.* 10*d.*

After the sale, in consequence of it being stated that the purchaser was willing to sell the ship for 400*l.*, Mr.

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Statement.

Sheppard, the plaintiff's solicitor, applied to the firm to know if they were willing to sell her for that sum, but, in reply to such application, Mr. Pearson wrote as follows:—

“Russia Chambers, 98, High Street, Hull,

“February 7th, 1860.

“A. F. Sheppard, Esq.

“Dear Sir,—You are wrongly informed. The price for the “Orwell” is 2000*l.*, and we have a customer for her in Russia, we expect, at a higher figure.

“Yours truly,

“Z. C. PEARSON.”

The eleventh paragraph of the bill was as follows:—
 “The said company allege that the speculation with the said vessel entailed heavy losses, and claim to be entitled to charge the said plaintiff, William Adolphus Marriott, with the losses consequent on such use of the vessel, and claim a balance due to them in their account with the plaintiff, and threaten and intend to issue execution on such judgment, against the person and property of the said plaintiff; but the plaintiff charges that the company might have sold the ship, under the power contained in the Merchant Shipping Act, 1854, or at all events ought not to have parted with such ship, and ought not to have offered the ship for sale under such disadvantageous conditions, and in their accounts with the plaintiff ought to be charged with the value of the ship at the time of taking possession thereof, and ought to be allowed the losses alleged to have been sustained by trading with the said ship. The plaintiff further charges, that nothing is due from him to the said company, and that, on the contrary, a balance is due from such defendants to the plaintiff, and if, in taking such accounts, a balance should be found due to the plaintiff, the company ought to be decreed to pay such balance, with interest at 5*l.* per cent., from the time when such balance became due to the time

of payment thereof; the plaintiff, on his part offering, if a balance should, in taking such accounts, be found due from him, to pay such balance to the said defendants. And the plaintiff further charges that the company ought, in the mean time, to be restrained by the injunction from issuing execution on such judgment against the person and goods of the said plaintiff.

On the part of the defendants, the captain of the vessel deposed that, at the time the defendants took possession, the captain and crew were engaged by the plaintiff, or at least the crew had been engaged by the captain, as his agent, up to the 5th of October, 1859, and that the plaintiff had granted return tickets until that period.

On the part of the defendants, several of the crew deposed that they had been engaged by the week, and some of them added, that they would not have entered into a longer engagement. The engineer further deposed, that, on the 17th of September, the defendants had given notice to discharge all hands on a week's notice. The ship's articles, which were made an exhibit by the defendants, stated that "the wages were to be weekly, as likewise this agreement."

The plaintiff deposed, that very few return tickets had been issued, and the notices stated, that they were "available any day the ship was running and had room." That only one person had made a claim in respect of the return ticket; and, on being shown this provision, was satisfied with the explanation.

There was a mass of very conflicting evidence as to the value of the ship, the plaintiff's witnesses fixing her value, the lowest estimate being at from 1500*l.* to 1800*l.*, and the highest reaching 2500*l.*

On the part of the defendants, the lowest estimate was 500*l.*, and the highest that of Mr. Horne, the auctioneer, who deposed that she was not worth more than 900*l.* when the company took possession.

On the 8th of May, 1860, the Vice-Chancellor granted

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an injunction, restraining the defendants from continuing proceedings on the execution they had taken out against the plaintiff. The defendants appealed against this order, and, on the 6th of June, the motion came on to be heard before the Lords Justices, when it was arranged, that, on payment into court of 120*l.*, the motion should be turned into a decree.

—
Argument.

Mr. *Malins* and Mr. *J. W. De Longueville Giffard*, for the plaintiff:—

First, it was submitted, that the mortgagee of a ship had no right to employ her in trade, but was bound, within a reasonable time, to sell her under the power contained in the Merchant Shipping Act^(a). A ship was a perishable chattel, and, therefore, those cases in which mortgagees of land had been held entitled to use it had no application. She was not only subject to the ordinary risk arising from wear and tear, but might go to the bottom in a moment.

Again, by the use of a ship, the owner, who continued owner, might be made answerable for damages arising from such employment. The 504th section of

(a) LXIX.—“A mortgagee shall not, by reason of his mortgage, be deemed to be the owner of a ship, or any share therein, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt.”

LXX.—“A mortgagee shall not, by reason of his mortgage, be deemed to be the owner of a ship, or any share therein, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship, except in so far as

may be necessary for making such ship or share available as a security for the mortgage debt.”

LXXI.—“Every registered mortgagee shall have power absolutely to dispose of the ship or share, in respect of which he is registered, and to give effectual receipts for the purchase money. But if there are more persons than one registered as mortgagees of the same ship or share, no subsequent mortgagee shall, except under the order of some court capable of taking cognizance of such matters, sell such ship or share without the concurrence of every prior mortgagee.”

the Merchant Shipping Act, while it limited the measure of liability of the owner for accidents, clearly recognised that liability for damages, occasioned without his fault or privity (a). It was no answer to a stranger that the persons in charge of the ship were not the servants of the mortgagor, because, though, as between mortgagor and mortgagee, the mortgagee was liable, a third person had a right to look to the person on the register as owner: *Fenton v. The City of Dublin Steam Packet Company* (b).

Again, the mortgagee does not appear bound to insure, but if the owner insured for his own protection, the acts of the mortgagee, if allowed to use the vessel, might forfeit the insurance.

There was no case in which it had been decided that a mortgagee of a ship was entitled to the use of her; there were, however, two cases in which Vice-Chancellor

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(a) CCCCIV. — "No owner of any sea-going ship, or share therein, shall, in cases where all or any of the following events occur without his actual fault or privity (that is to say) —

- (1). Where any loss of life, or personal injury is caused to any person being carried in such ship.
- (2). Where any damage or loss is caused to any goods, merchandise, or other things whatsoever, on board any such ship.
- (3). Where any loss of life or personal injury is caused to any person carried in any other ship or boat, by reason of the improper navigation of such sea-going ship or boat.
- (4). Where any loss or damage is, by reason of any such improper navigation of such sea-

going ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever, on board any other ship or boat,

be answerable in damages to any extent beyond the value of his ship and the freight due or to grow due in respect of such ship during the voyage, which at the time of the happening of any such events as aforesaid is in prosecution or contracted for, subject to the following proviso (that is to say) that in no case where any such liability as aforesaid is incurred in respect of loss of life or personal injury to any passenger, shall the value of any such ship and the freight thereof be taken to be less than fifteen pounds per registered ton."

(b) 8 Ad. & E. 835.

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Wood expressed an opinion in favour of the mortgagee's right, *The European and Australian Steam Packet Company v. The Royal Mail Steam Packet Company*(a), *De Mattos v. Gibson* (b); but he decided the question there raised on different grounds.

Secondly, assuming the mortgagees entitled to use the ship in a proper way, it was submitted that they were not entitled to engage her in a speculation, and still less to throw the losses in trade on the mortgagor.

In this case they were warned by the plaintiff that the Ipswich and London traffic was a losing one, that he had lost considerably, and had finally discontinued it; but they chose to embark in the speculation, and thereby sustained considerable losses. If they chose to keep the ship in their own possession, they must be charged with a proper rent: *Truelock v. Roby*(c). As to charging the trade losses on the mortgagors, there was and could be no case that went that length. The mere right to use the mortgaged property, which was all Vice-Chancellor Wood sanctioned by his opinion, was a very different thing from the right to charge the mortgagor with the cost of everything that the mortgagees might require to make what use of the chattel they pleased. It was submitted there was no authority for such a proposition.

Again, a mortgagee must not commit waste: *Thornycroft v. Crockett*(d), *Williams v. Price*(e), *Smart v. Hunt*(f). Here it was in evidence, that the defendants, by their improvident conduct, had so injured the vessel, that had she been forthcoming it would be a matter of course to have ordered an inquiry as to the damage done; but the defendants having by their conduct made that course impossible, it was submitted that the proper course would be to charge them with value when they took possession. *Omnia præsumuntur contra spoliatores*. This was a

(a) 4 K. & J. 676.

(b) 1 J. & H. 79.

(c) 15 Sim. 265.

(d) 16 Sim. 445.

(e) 1 S. & St. 581.

(f) 1 Vern. 418.

principle of law, *Armory v. Delamirie* (a), as well as of equity: *Lupton v. White* (b).

The defendants, having driven the plaintiff into this court, must pay the costs of the suit; moreover, having sold the property, they proceeded on the collateral security, which they had no right to do: *Lockhart v. Hardy* (c).

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Mr. Shapter and Mr. Dickinson for the defendants.

Not only was the mortgagee bound to make the mortgaged property profitable, but in some cases he would be charged with wilful default, if he neglected to do so.

It was contended that the mortgagee of a ship stood in a different position in this respect, but no authority had been adduced in support of that proposition. It might be that a mortgagee would ordinarily rather realise his security than retain possession of the ship, and that might explain why no actual decision had been given as to the mortgagee's right; but in a case where the question had risen incidentally, Vice - Chancellor Wood had expressed his strong opinion in favour of the mortgagee's right to use the ship: *The European and Australian Mail Company v. Royal Mail Company* (d); *De Mattos v. Gibson* (e). It might be that this was a dictum, but there was absolutely no authority the other way.

It was admitted that the ordinary right of the mortgagee of a ship was to sell her, and here the defendants endeavoured to sell her, but without success. It was objected to the sale, first, that she was sold with her engagements; secondly, that there was a mis-description in the particulars of sale; thirdly, that there was no opportunity for inspection, as the vessel was kept running.

As to the first point, there was an engagement subsisting between the plaintiff and the crew, which was a charge on

(a) 1 Smith, L. C. 151.

(d) 4 K. & J. 676.

(b) 15 Ves. 432.

(e) 1 J. & H. 79; s.c. 4 De G.

(c) 9 Beav. 349.

& J. 276.

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the vessel, and there were also return tickets granted by the plaintiff.

Secondly, the particulars of sale were sent to the plaintiff to correct, and he refused to put them right, though he raised the objection, and could not therefore now be heard to complain; moreover, they were corrected when the ship was offered for sale on the 12th of August.

Thirdly, the company, in continuing the running, were acting to the best of their judgment and *bonâ fide*, and were therefore not responsible.

On the whole case, it was submitted that the defendants were entitled to use the ship, and that they did so *bonâ fide*, and with a view to benefit the mortgagor, and therefore had done all that a mortgagee was required by the law of this Court to do.

With regard to the ultimate sale, the evidence showed that the vessel was worn out, and the mortgagees having endeavoured to get the best price they could, were justified in selling her for 750*l*. An attempt had been made to impute to them improper motives in selling to Messrs. Pearson, but that had been completely disproved.

Lockhart v. Hardy was a case of foreclosure and not of sale.

On the whole, it was submitted the only decree the plaintiff was entitled to was the common decree for redemption against mortgagees in possession.

[*Gardner v. Cazenove* (a), was cited. See also *Dickenson v. Kitchen* (b).]

Mr. *Malins* in reply.—Seamen could no longer proceed in the Admiralty Court for sums under 50*l*. Their remedy was to apply to the local magistrate: section 189 of the Merchant Shipping Act, 1854. Moreover, the measure of damages for breach of contract was a month's wages: section 167. But, further, the evidence wholly disproved the alleged contract.

(a) 1 H. & N. 423.

(b) 8 Ell. & Bl. 789.

THE VICE-CHANCELLOR:—

This is a case of considerable difficulty, because the Court has to decide how far a mortgagee, who took possession of mortgaged property of a peculiar description, has acted in that careful and provident manner in which the Court requires every mortgagee to act when he takes possession of the mortgaged estate. The subject-matter of the mortgage was an iron steam-ship. She had been employed for some time in carrying goods and passengers between London and Ipswich. On the 20th of July, 1859, the defendants, being mortgagees of this vessel, took possession of her; and it is beyond all question that the taking possession was an act which was entirely justifiable. They sold her at the end of the month of October following, for the sum of 750*l*. The question is, whether, in adjusting the account, the plaintiff, as mortgagor, is to have credit only for the sum of 750*l*., produced by the sale at the end of October, or whether the conduct of the defendants from the time they took possession of the ship, and the way in which they dealt with the ship, has been such as that the Court can justly charge the defendants with the value of the ship as she was when they took possession.

Where a mortgagee enters into possession of the mortgaged estate, with a view to sale, he is bound to act with the same care and the same prudence, and to use every effort, which a prudent proprietor would use, to have the sale conducted to the greatest advantage. Upon the evidence of the defendants themselves, it appears that they employed a person of the name of Horne, an auctioneer, and a person who is experienced in the sale of property of this description, to advise them as to the best mode of bringing her to sale. He was instructed to examine the vessel. He says he examined her, and it appears from the witness's own evidence, that the day after he took possession he came to the defendants, and brought with him the captain or commander of the vessel, the engineer of the ship, and, I

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believe, another person. It appears that the commander made a difficulty, alleging that the crew had an engagement with the plaintiff which entitled them to wages for their services on an agreement to endure to the 5th of October. I think it is clearly proved that that statement was an untrue statement, and in fact it appears from the evidence that the defendants themselves must have ascertained it to be an untrue statement; for the evidence shows that, although on the 21st of July the defendants were made to believe that the crew, captain, and engineer of the ship were engaged till the 5th of October, and they acted upon that belief, yet that they themselves dismissed them on a notice of the 16th of September as on a weekly engagement, which was to expire on the 23rd. The documentary evidence and the parol evidence prove that they were not engaged on any binding engagement that could be considered as in any degree binding on the defendants by any other than a weekly engagement. The consequences of any misrepresentation on this subject must rest with the defendants, for it does not appear that the defendants took the trouble, before they acted upon the belief of this engagement, to ask the plaintiff whether it was true or not; and it appears that the plaintiff, as soon as he heard that such an allegation had been made by the captain, within a very few days after the defendants had taken possession of the vessel, told them that there was no such engagement; that it was all nonsense; warns them of the consequences of acting on such a belief, and advises them not to work the vessel upon such an engagement. It appears that the plaintiff had good reason for giving that advice, for he himself had ceased to employ the ship in the way in which the defendants resolved to employ her, and had ceased to do so because he found that it was a losing business.

By the law of this Court, and the principles of common sense, if a mortgagee takes possession of the

mortgaged property, and uses it for the purpose of any speculation or adventure, which turns out unfortunate, he must bear the loss. Here the question is, whether the plaintiff is to be charged with the sum of 450*l.* in respect of the losses incurred. It would require a very strong case indeed to justify the Court in saying that a mortgagor is to be visited with a loss wilfully and advisedly incurred by the mortgagees, in entering into a losing speculation. The defendants must bear the consequences of the misconduct of their agent.

With regard to the attempted sale, it appears that the auctioneer penned, and printed, and circulated advertisements which described the vessel as having two boilers, but that one was of particular value, for that it had recently been fitted up at a very great expense; the fact being that she had only one boiler. The plaintiff warned the defendants that there was a misdescription in the advertisement. The witness Parkinson, who gives his evidence for the defendants, speaking of the value of the vessel, says: "From my knowledge and experience of boilers generally, they depreciate very much in value, and, supposing them to be subjected to easy wear, they would not be worth more than half the price they cost after twelve months' use." Now this is the defendants' evidence: they say that they kept the vessel running, and used her in order to bring her to a sale to advantage. Yet it appears that, if they kept her running for twelve months, the boilers would not be worth half what they cost at the end of that time. But what the plaintiff besought the defendants to do was not to run her. His letter of the 13th of August states to them, in the clearest and I think the most sensible way, that their course was to discharge all the crew and the captain, who were only at weekly wages, and lay the vessel up in dock. He tells them that Victoria Dock is the cheapest dock, and he recommends them to employ a careful man, whom he names, and to use the best means when she is laid up to find a purchaser.

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Horne, the auctioneer, says, in the fourth paragraph of his first affidavit, that, "the steamer was not, in my judgment, worth more than 900*l.* at the time when the company took possession." Therefore, according to the defendants' evidence, she was worth 900*l.* when they began to use her, and she sold for 750*l.* at the end of this losing speculation. As to the mode of conducting the sale, there is no evidence of the publication of advertisements or inquiries for purchasers. The only advertisement they seem to have published with a view to attract purchasers was the advertisement with the gross misdescription that the vessel had two boilers. All this shows the very reverse of that prudent and careful management of the property, with a view to a sale to the best advantage, which the Court requires of a mortgagee. The decree must therefore be as follows:—

Declare that, having regard to the way in which the defendants dealt with the steam-ship, stores, and effects, in the pleadings mentioned, after they took possession thereof on the 20th of July, 1859, the defendants, in taking the accounts hereinafter directed, are to be charged with the value of the said steam-ship, fittings, stores, and effects therein, at the time when they so took possession thereof. Let the chief clerk ascertain and state what he shall find to be the fair value of the said steam-ship, fittings, stores, and effects therein, so taken possession of by the defendants on the 20th of July, 1859, when such possession was taken. Then there will be the usual account of what is due for principal money, interest, and costs, properly incurred before the 20th of July, 1859, upon the security of the ship, and a direction to charge the defendants in taking the accounts with what is ascertained to be the value of the ship. Tax the plaintiff's costs of the suit up to and including the hearing. Order the defendants to pay the plaintiff the amount of such costs. Reserve further consideration.

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22nd.

THIS was a motion for an injunction against certain defendants to restrain the defendant William White from acting as agent or manager of the society, from selling any of the books of the society, from receiving any monies due to the society, and from selling, publishing, or advertising from the house of the society any Spiritualistic books, periodicals, or other works, and from disturbing, hindering, or molesting the plaintiffs, or their agents, in the possession or enjoyment of the said house, books, stock-in-trade, fixtures, furniture, and effects, or in carrying on the business and objects of the said society at the said house; and that the other defendants might be restrained from permitting, aiding, or abetting the said William White in acting as aforesaid.

The bill alleged, that, on the 26th of February, 1810, certain persons, professing the doctrines of Swedenborg, formed themselves into a society, and at the meeting passed rules and regulations for the government of the society. Between that period and 1834, the society increased in numbers, and acquired considerable property. On the 19th of June in that year, a meeting was held, at which it was resolved, that a deed of trust, declaring the constitution of the society, should be enrolled, which was executed on the 4th of August, 1834. By the deed, which was under the hand and seal of the then committee, it was testified and declared, that the rules, orders, and regulations thereinbefore recited, were the rules, orders, and regulations of the said society; that such society was a voluntary society, consisting of such persons as contribute to the funds thereof by annual voluntary subscriptions and otherwise; and that no member,

Where the managing body of a religious society appointed an agent at a salary, with "six months' notice of separation on either side," with liberty to occupy and carry on his trade in a house belonging to the society, and afterwards summarily dismissed him for alleged misconduct, and resumed the possession of the house, of which they were afterwards forcibly dispossessed by the agent: on a bill filed by the managing body, the Court granted an injunction to restrain such agent from disturbing their possession.

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whether filling any office or not, had any beneficial interest in the funds and effects thereof, unless the privilege of purchasing books under the said rules should be considered as such, but that the same were, and should be, exclusively applicable to and for the purpose of printing and publishing the works of the said Emanuel Swedenborg, according to the rules, orders, and resolutions of the said society; and also that the said parties thereto, in their several and respective characters of chairman, committee-men, treasurer, and trustees, did thereby accept such respective offices, and by the said deed-poll testified and declared that they were amenable to the foregoing rules, orders, and resolutions, as far as the same concerned them respectively, and to all rules of law and equity applicable to their respective situations and characters; and likewise, that, so long as they filled the said offices respectively, or were members of the said society, they should become amenable to such further rules, orders, and resolutions of the said society as should be thereafter made under the authority of the rules for the time being, and be declared, concerning the affairs thereof, and to all rules of law and equity applicable thereto.

In 1854, the society, having determined to establish a library and reading-room, and to take suitable premises for that purpose, and for a shop at which the society's publications might be kept and stored, advertisements were published for a librarian and storekeeper, and the committee, at a meeting held in July, resolved, that the person appointed should have rent and premises tax-free in a good situation; that 35*l.* per cent. should be allowed to the storekeeper on all books sold out of the stock, but not on donations or subscriptions; he making such arrangements with booksellers, agents of the said society, as the committee might from time to time determine, and that he should be allowed to carry on a retail

business in other New Church works and general literature for his own benefit; the committee guaranteeing him 150*l.* for the first year. At a meeting of the committee, held on the 13th of July, 1854, the minutes of the meeting of the 6th of July, 1854, were read and confirmed, and it was "resolved, that William White, of Glasgow (the defendant) be elected the storekeeper and agent in the general terms mentioned in the said resolution of the 6th of July, 1854, with such modifications as might be agreed upon, and that Mr. White should be requested to meet the committee as early as possible to arrange the final terms, and to assist in looking for a proper house."

Mr. White was afterwards appointed storekeeper and agent, and held the office until dismissed in consequence of the present dispute, but during the last two years he only received a salary of 75*l.*

In June, 1855, the society purchased a lease of the house now in dispute for eighty years, being No. 36, Bloomsbury Street, for the sum of 1450*l.* On the purchase, the society converted the ground-floor into a shop and warehouse for the publication and sale of the writings of Swedenborg, and the first-floor into a library and reading-room for the use of the members of the society, and permitted William White, the defendant, to occupy the upper rooms for his residence. A general meeting was held on the 19th of June, 1855, at which the laws and regulations of the Swedenborg Society were revised.

The rules provided, among other things (rule 10), that no alteration should be made in the laws of the society, except in a general meeting, and no motion for that purpose should be received unless notice should have been given to the secretary for one month previous. The 13th rule provided that the affairs of the society should be conducted by a committee consisting of twelve mem-

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bers, who should be elected at the annual general meeting from donors of 5*l.* and upwards, and annual subscribers of 1*l.* and upwards, residing within ten miles of the society's house, and of the treasurer, who should be a member of the committee by virtue of his office. The 21st rule provided that the treasurer should be appointed annually by the general meeting, and should be a member of the committee by virtue of his office.

At the annual general meeting held on the 19th of June, 1860, all the plaintiffs and two of the present defendants were appointed the committee.

The bill alleged that within the last few years certain persons had formed themselves into a society and described themselves as Spiritualists. They professed to hold communion with the spirits of the dead, and with angels and demons by means of tables and other inanimate objects, and also by means of certain persons among them whom they call mediums. And they said that by such agencies the spirits conferred with, gave revelations on all manner of subjects. The bill further alleged that books advocating these doctrines have been published, containing accounts of revelations which the authors allege to have been made by different spirits. One of these authors called himself the Rev. T. L. Harris, and was the author of the "Arcana of Christianity," having an appendix called the "Song of Satan," which the bill alleged contained passages of such a blasphemous and ribald description that the pleadings of the Court ought not to be contaminated with them. The bill also alleged that the Spiritualists published a periodical called the "Spiritual Telegraph," now the "Spiritual Magazine," which was sold by the defendant White, in which, among other spiritualistic works, he published the "Arcana of Christianity, or, Song of Satan." The bill alleged that the said William White also published another work of Mr. Harris's, called the "Herald of Light," which

spiritualistic works were advertised side by side with the works of Swedenborg. The committee having ascertained that the defendant White was selling such spiritualistic works, at a meeting held on the 5th of July, 1860, passed the following resolution, two of their body dissenting, viz., Mr. Wilkinson and Mr. Fryor:—

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“ That the committee deem it inexpedient that the writings of the Rev. T. L. Harris, or any other works commonly called spiritualistic, shall be kept in stock or exposed for sale in the society’s house, and that the manager be requested not to permit his name to appear as publisher or agent upon any such works, or to be advertised as a seller of them.”

The bill alleged that the committee immediately communicated the resolution to Mr. White, and assured him that the society would indemnify him against any pecuniary loss. On the 2nd of August, 1860, Mr. White sent to the plaintiffs the following letter:—

“ 36, Bloomsbury Street, London,

“ 2nd August, 1860.

“ To the Committee of the Swedenborg Society.

“ Gentlemen,—At your last meeting, when you passed the resolution excluding the writings of the Rev. Thomas L. Harris, or any other work commonly called spiritualistic, from my stock and your house, I was asked what I had to say to it. Taken by surprise, and with no time for counsel, I replied, ‘ I cannot promise to obey your resolution. I shall take it into consideration, and give you my answer in a month.’ My answer I now give. In 1854, I became your manager, and took office with the distinct understanding that I was to be allowed to carry on business as an independent bookseller and publisher. You were neither involved in my success nor in my losses, nor compromised by my doings in any way. That agreement has been continued to me from that time.

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Under this agreement I have invested money in stock, and amid many difficulties have laboured year by year to make a business. Your resolution is an infraction of my agreement; it destroys my property, and undoes my work. Under it I should be no longer an independent bookseller and publisher, and thenceforth you would become responsible for whatever was sold in this place. I cannot, therefore, yield to your resolution. In this refusal I commit no act of disobedience. I only require that you carry out your side of the contract, and when it ends we may negotiate anew.—I am, gentlemen, your faithful servant.”

On reading this letter, the committee passed a resolution giving Mr. White six months' notice of dismissal; but, as the bill alleged, Mr. White, at a meeting held on the 4th of October, 1860, having stated that he had withdrawn all the works objected to from the window and tables, and having undertaken not to sell any more spiritualistic works, the committee rescinded their notice of dismissal. A few days afterwards, Mr. Wilkinson sent to the committee a requisition to call a general meeting, signed by several members, at which it was proposed to move resolutions at variance with the resolution of the 5th of July previous; but in order to prevent future disputes, suggesting that the following rule should be added to the laws of the society:—"The Swedenborg Society is responsible only for the publication and sale of the theological works of Emanuel Swedenborg, published by the society," and also, "That the manager be at liberty to carry on business as an independent bookseller and publisher on his own responsibility."

The bill alleged that the committee at first determined to call a general meeting, but having appointed a sub-committee to revise, they found that 165 new names had

been added, of whom 125 were entered on the 4th of August, 1860. The bill alleged that the committee were refused any information as to the sudden influx of members or as to their subscriptions, and alleged that many of them were mere children, and that a great number did not subscribe of themselves, being too poor, and that the votes described as of Birmingham could not be found. The bill averred that there had been a fraudulent fabrication of votes. The committee declined to hold the required meeting, but on the 8th of November, 1860, they met and passed a resolution that it was inexpedient that Mr. Wilkinson should be longer secretary, and appointed Mr. Butter. They resolved also:—

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“That as acts of Mr. White, inconsistent with his duties as manager and agent of the society, have come to the knowledge of the committee, he be now dismissed, and that he be required forthwith to quit the society’s house in Bloomsbury Street, and to remove his own stock and other property; that immediate possession be taken by the committee of the society’s premises and property, but that in carrying out this and the last preceding resolution, regard be had to the personal convenience and accommodation of Mr. White so far as it can be done without prejudice to the interests of the society.”

At the same meeting the following letters were read and handed to Mr. White:—

“Mr. William White,—I hereby give you notice that you are dismissed by the committee of the Swedenborg Society from the office of manager, as well as of storekeeper and agent of the said society.

“Dated this 8th day of November, 1860.

“By order of the committee,

“JOHN SPURGIN.”

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“ To Mr. William White,—I hereby give you notice forthwith to deliver up possession to the committee of the Swedenborg Society of those portions of the premises at No. 36, Bloomsbury Street, in the parish of St. Giles-in-the-Fields, in the county of Middlesex, which you occupy under your arrangement with the committee.

“ Dated this 8th day of November, 1860.

“ By order of the committee,

“ JOHN SPURGIN.”

“ Sir,—On behalf of the committee of the Swedenborg Society, I beg to inform you that, although the committee have found it necessary for the protection of the interests of the society, to dismiss you from the office of manager and agent of the society, the committee are most anxious to carry out what they are advised to be their duty in this respect in such a manner as to press as little as possible on your private interest or convenience, and that they are prepared, while distinctly denying any legal claim on your part, to take into consideration what sum they can allow you gratuitously in the nature of compensation for your dismissal without notice; and in doing this, they desire to act with all possible consideration and liberality, but they cannot pledge themselves to any specific terms, which must depend on circumstances to which they deem it unnecessary now more particularly to refer, and on your own course of proceeding. I make this communication to you wholly without prejudice to any of the rights of the society.

“ By order of the committee,

“ JOHN SPURGIN, Chairman.”

Mr. Butter accepted the office of secretary. After the business of the committee was over, the chairman, on going downstairs, found, as the bill alleged, the doors of

the shop locked up, and Mr. White having refused to open it, a carpenter was called in, who forced the doors, and put other fastenings on them, and certain persons were put in possession on behalf of the society. Shortly afterwards, a special general meeting of the society was called by those persons who dissented from the resolutions of the committee at the meeting on the 12th and 13th of November, when the following resolutions were passed:—

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“1. That it is inexpedient for the society, or its committee, to pass any judgment, condemnatory or otherwise, on any religious or secular questions whatever; and that, in the opinion of this meeting, their agent, Mr. White, has acted strictly and honourably in accordance with the terms and meaning of his agreement with the society, and has given no just cause for interference with the freedom of his business as bookseller and publisher.

“2. That, in order to give the society's agent or manager for the time being the necessary security and independence for the due working of his business, the words ‘and may appoint a salaried agent or manager’ be rescinded from law 14, and that the following be added to the laws, ‘A salaried agent or manager may be appointed at any general meeting of the society, and agreement made with him, as such meeting may determine.’

“3. That Mr. William White, the present agent or manager, having relinquished the business of general bookseller and publisher at Glasgow, in consideration of an agreement made with him by the then committee of the society that he should be at liberty to carry on a similar business on the society's premises in addition to his duties and emoluments as agent to the society; and he having given great satisfaction to the society during the many years he has acted as its agent, this meeting hereby confirms the said agreement with Mr. White, and offers him a permanent engagement to the same effect for a term of seven years from the date of the

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next annual general meeting, at a salary of 125*l.*, commencing from this date.

“ 4. This meeting having made Mr. White an offer of a permanent engagement as agent or manager of the society for a term of seven years from the date of the next annual general meeting, with the privilege of carrying on a bookselling business of his own, at a salary of 125*l.*, commencing from this date, and Mr. White having accepted the said offer, it was resolved, ‘ That Mr. Wilkinson and Mr. Fryor be hereby deputed forthwith to enter into and sign on behalf of the society a sufficient agreement with the said William White, binding him and the society to a faithful performance of the terms and meaning of the said engagement, and that they be indemnified out of the funds of the said society.’ ”

There were also resolutions to the effect that, to prevent misconception, there should be a declaration that the Swedenborg Society should be responsible only for the sale and publication of the theological works of Emanuel Swedenborg published by the society ; that the manager be at liberty to carry on business as an independent bookseller and publisher on his own responsibility, “ that the society entirely disapproves and annuls the present action of some members of the committee, breaking into and taking forcible possession of the premises in the lawful occupation of Mr. White, and hereby reinstates him in full possession thereof, and authorises and desires him to take any measures which he might be advised at the expense of the society to retain or obtain undisturbed possession thereof, and that the meeting further enjoins on its present committee to assist to the best of its power to this end.”

On the 26th of November, 1860, about ten o'clock in the morning, the bill alleged that William White and Thomas Gardiner managed to procure admission to the premises, and, accompanied by a pugilist named Jem

Dillon, and about a dozen companions, violently ejected the servants of the committee, and took possession of the house and shop, and continued in possession until the present time. At the meeting at which these resolutions were passed and carried, several of the plaintiffs attended, and protested against the legality of the proceedings, but the resolutions were nevertheless carried. On the 5th of December, 1860, the resolutions were forwarded to the committee, with a notice signed by several members of a public meeting, convened for the 4th of January, 1861, at the Freemasons' Tavern. The plaintiffs thereupon filed this bill for an injunction.

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Mr. *Malins* and Mr. *H. Stevens*, for the plaintiffs, relied on the evidence which had been adduced on behalf of the plaintiffs. The plaintiffs were clearly entitled to the possession of the house and shop. It was not denied that the plaintiffs were properly appointed, and, if so, were the legal owners of the property, unless they had been removed in the mode prescribed. The only ground on which the defendants relied was a resolution passed at a general meeting held on the 12th of November, which, it was submitted, was illegal. It would not be necessary to consider the question whether the works complained of were what the plaintiffs represented them to be. The sole question the Court had now to consider was, whether the plaintiffs had a right, as trustees for the society, to have the property restored to them. The Court had occasion, in the case of *Perry v. Shipway* (a), which was affirmed on appeal, to consider the very question raised here, and it decided that the trustees were entitled to have the possession of the property secured to them.

Argument.
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Mr. *Bacon* and Mr. *Hobhouse* said, as against Mr. *White* (no injunction being pressed against the other

(a) *Antè*, vol. I. p. 1.

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parties at present), he was a tenant of the society, and it was not competent for the plaintiffs to file a bill in that court to turn him out of possession. If the plaintiffs were right in their view, their proper remedy was by an ejectment at law, and not by a bill in this court. In *Perry v. Shipway*, some of the trustees sided with the plaintiffs and some with the defendants, and the legal ownership being thus divided, it was impossible to bring an ejectment, and therefore the Court entertained the bill. But even in that case, as was pointed out by Lord Justice Knight Bruce on appeal, the plaintiffs did not file the bill until after the expiration of the twelve months for which the minister was appointed. The affidavits filed on the part of the defendants denied that there had been any fabrication of votes or any violence, and alleged that the meeting of the 12th of November, 1860, had been duly convened, and the proceedings regular, and consequently, that the plaintiffs had no *locus standi* in this court. The defendants on their part complained of the injury done to Mr. White in his trade.

It was submitted therefore, that the Court could not grant the injunction. It was also alleged that the books complained of had been sold for years without objection.

Mr. *Murray* appeared for two of the defendants, but it was arranged that, except as to Mr. White, the motion should stand over till the hearing of the cause.

Judgment.

THE VICE-CHANCELLOR:—

In this case the plaintiffs, who are the trustees and governing body of a voluntary association, ask the assistance of the Court to restrain the defendant White from acting in a manner which they consider to be inconsistent with their rights of property, and inconsistent with what has been done by them in the exercise of their duties as the governing body of this society. The plaintiffs say that Mr. White was engaged by them as their

manager, at a certain stipend, with certain duties to discharge; and that, in addition to his stipend, he had a right to occupy a part of a house which is the property in law of the trustees, and a right to use a part of that house for the purpose of carrying on his own trade as a bookseller. He has very properly urged the importance to him of that right which he stipulated for; and he has urged upon the Court the loss and injury which may occur to him if the relief against him which the present plaintiffs seek be granted by the Court.

In a case of this kind, the Court has only to look at the rights of the parties, whether as legal rights, or as such rights, if not strictly legal, as are within the jurisdiction and protection of this Court. If the defendant White has by contract a right to the present occupation of this house, or to that part of it in which he carries on his business, and if his right has been improperly violated or infringed, he ought to have the protection of the Court. The present situation of Mr. White, however, is very peculiar. The plaintiffs, in the exercise of what they consider their duty, and in exercise of a power which they assert to be legitimate, have dismissed him, and forbidden him to carry on his business in the way which he wished; and they say they have done so because in their judgment he, being the manager of the affairs of the society, was using his right in a way which they considered fatally injurious to the interests of the society of which they are the governing body. It is necessary, therefore, in the first place, to consider what are the rights and situation of Mr. White.

It appears from what is stated in the fifth paragraph of the bill, that, when the society in the year 1854 determined to take the house in question and fit it up as a shop for the sale of certain publications, which it was the purpose of this society, or one of its purposes, to disseminate, at a meeting of the committee which was held

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by the governing body on the 6th of July, it was resolved, that the person to be appointed to the situation which Mr. White now occupies, should have "rent and premises tax-free, in a good situation; that 35*l.* per cent. should be allowed to him on all books sold out of the stock of the society, he making such arrangements with booksellers, agents of the said society, as the committee might from time to time determine; and that he should be allowed to carry on a retail business in other New Church works and general literature for his own benefit; the committee guaranteeing him 150*l.* for the first year." The first question is, whether on an engagement in these terms Mr. White acquires anything which at law can be considered other than a tenancy at will, and which has been repeatedly dealt with in cases at law, both as to schoolmasters and ministers of dissenting chapels, who are allowed a residence. In other words, the question is, whether the governing body and those of them who have the legal estate have the power to dismiss a person who holds an office with rights of residence without notice. Now, it is an important circumstance, that, according to the terms of the engagement, there was to be six months' notice on either side. The appointment was made in the following terms:—"That Mr. White be manager at a salary of 75*l.* a year, and six months' notice of separation on either side." There is nothing said as to carrying on a trade, or being allowed to carry on the trade of bookseller; but, upon a fair construction of the articles of the engagement, it seems to me that Mr. White's appointment at a salary of 75*l.* must be read with reference to the rights and privileges which had been secured to him, that he should be allowed to carry on a retail business in other New Church works and general literature for his own benefit.

The true view of Mr. White's right to the occupation and use of the premises for the purposes of trade, or any other use of this property, seems to me to be that it is the

same precarious right which has been dealt with in many cases, particularly by Lord Tenterden and the Court of King's Bench in two cases, viz., one the case of *Doe v. Jones* (a), and the other *Doe v. McKaeg* (b). In the first of these cases, the question was, whether the minister elected by a congregation of dissenters, and put in possession of a chapel, dwelling-house, and premises, by officers acting under the authority of the trustees, who was dismissed, was entitled to a notice to quit, or whether he was bound to give up the premises on demand. There was a question also as to the use of the pulpit, and its occupation as pastor or preacher. Baron Parke, says, p. 720, "The use of the pulpit is like an easement, a right of common or of way." In this case the defendant had no other estate in the premises than that of tenant at will, and that has been put an end to by the demand of possession. In other words, it was something so incident to the office, that the right to it was lost with the right to the office. In the next case (*Doe v. McKaeg*) there was an ejectment to recover from the defendant, who was the minister of a dissenting chapel, the possession of the chapel and dwelling-house, in possession of which he was placed by trustees in whom the legal estate was vested; and the defendant was held to be tenant at will to them. It was contended that the tenancy was not determined by a demand of possession without notice; that a mere demand of possession was not enough. But Lord Tenterden (p. 723) laid down a general rule, that "where an estate is held at the will of another, a demand by that other determines the will."

In this case, however, there is a right to six months' notice; but if the use and occupation which is given by a governing body with a view to the benefit of the society is, in the opinion of that governing body, turned to a purpose against the interests of the society of which they

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(a) 10 B. & C. 718.

(b) *Ibid.* 721.

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are the governing body, I apprehend that, whatever may be the consequence in damages for a sudden turning out of possession, one of their duties is to see that the property which is held in trust for a particular purpose is not by the persons acting under their directions used for purposes hostile to the interests of the society.

In *Perry v. Shipway*, which was the case of a chapel and a dissenting minister, the Court had to consider the question which arises when a person, in the employment of the governing body of a society for the exercise of certain duties, transgresses his duties; whether it is not essential to the existence of such a society that the governing body and the majority of the governing body should have a right, in a case where the vital interests of the society are concerned, to prevent the use and occupation of the property from being abused.

In this case, it is only necessary to look at the resolution of the 8th of November to see that these plaintiffs, for reasons which they thought sufficient, considered it their duty at once to dismiss Mr. White, and to put an end to his occupation of the house for residence, and for the purpose of carrying on his trade. What the Court has to deal with now is not—as upon the final hearing of the cause—the merits of this question; but, if the Court sees no reason to doubt that, in the exercise of their honest judgment, the committee came to this resolution—unless there appears a strong reason for supposing that all their powers have been destroyed—where the whole question is raised upon an interim application until the question in the cause can be decided, it would be a very strong thing for the Court to hold, that, in passing this resolution, the governing body of this society, who have the legal property in this house, have transgressed their duty, or have violated or put an end to any right other than those which in the exercise of their duty they had a reason to suppose they ought to put an end to.

It is a most important consideration on the present occasion, that, in defiance of this resolution, and against the will of the persons who have the legal right to the property, and who are the governing body, by force and violence the defendant White has, after being expelled from the occupation, again violently intruded himself upon the property of the plaintiffs. Even if the ultimate decision of the Court be that Mr. White was right and the committee wrong, all that can be dealt with on the present occasion are the *prima facie* rights of the parties. The Court is asked by Mr. White to allow him to retain that possession of property belonging to other persons which has been violently obtained by him from the legal owners. Assume that he was improperly dismissed—assume that he was improperly prevented from carrying on his business, and that he will suffer injury—still there was such a violent interruption of the possession of the plaintiffs as this Court will not countenance. What the Court has to deal with is merely the legal rights of the parties; and I know of no view of this case which will justify the Court in considering that a possession obtained and kept by violence should be protected, such as now retained by Mr. White; under circumstances, too, which make his present occupation and the carrying on of his trade entirely out of the question. The house is shut up, and it is impossible for him, placed as he is, to carry on his trade there at all.

It has been said, that Mr. White's possession is fortified by the resolution of the meeting held on the 12th and 13th of November. That meeting purports to have placed the defendant White (in defiance of those who had the legal estate, and in defiance of the opinion of the committee) in possession of his office of manager, and of all the rights appendant to it, for seven years to come. Suppose, for a moment, that that meeting has been duly convened—whether it has been duly convened or not, is a question in the cause—it presents the strange

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spectacle of a complete rebellion on the part of the main body of the society against those who have been legally constituted its governing body. I asked Mr. Bacon whether it was part of his case that the committee, who are the governing body, and the trustees, who have the legal estate, were displaced by the meeting of the 12th of November. The answer was, that they were not. No doubt, in a sense, the governing body are responsible to the great body whom they govern. But if the body who are governed pass a resolution which is in defiance of those whom they still call governors, what is to be done? It is admitted that the governors remain governors, but they are not to govern in one particular part of their duties—the merits of the conduct of the parties with regard to which is one of the questions in the cause.

I am therefore wholly unable to see, considering that this is merely an interlocutory application pending the litigation, how the Court can hold that such a possession as that now held by the defendant White shall be continued. On the other hand, it seems to me that it would be an unseemly and improper thing for this Court to refuse its assistance, and not to protect the legal right of the trustees and the legal right of the governing body to a peaceable and uninterrupted occupation of property which is theirs, and with which this Court would have no right to interfere, unless it saw on the part of the trustees and the governing body some gross, wilful and flagrant violation of the rights of the parties against whom they are doing the acts which are stated in the present case. It is true that acts which have been complained of have been done on both sides. But I do not consider the effect of that meeting of the 12th and 13th of November to be free from the objections which are made to the proceedings upon that occasion by the plaintiffs. It is unnecessary to decide that question now. I only wish to guard myself from the expression of any opinion that, looking at the laws of the society, that meeting was

regularly convened as a meeting of the society, or that it was composed of members who can be considered for the purposes of this litigation fairly and properly members of this society. It is unnecessary to go farther into the merits of the case, but I find the bill asserts that the body governed has been changed—that the body of the society has been so essentially changed as that its proceedings cannot be recognised as proceedings of that body of which the committee are members. The committee are the persons to whom by the ninth rule, notice of a general meeting is to be sent, and the question is, whether any message sent by any non-recognised members of the society could have its effect as a proper summons.

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These are questions for the hearing of the cause. But, in the meanwhile, looking at the way in which the possession of White has been forcibly and as I think unjustifiably obtained, and looking at the way in which he is now in possession of the property, it seems to me the plaintiffs have established a right to the interim order for an injunction, now reserving all questions as to the rights of all other parties to the hearing of the cause.

Order that the defendant White be restrained till further order from acting as agent or manager of the society in the pleadings named, or from selling any of the books of the society, and from receiving any of the monies due or to accrue due to the society, or from selling or advertising from or at the house of the society any books, periodicals, or other works until further order, unless under the order or with the permission of the plaintiffs; and from disturbing, hindering, or molesting the plaintiffs, and their agents, &c., as prayed by this bill, but without prejudice to any question as to the right, if any, of the defendant White to recover damages from the plaintiffs, or any of them, by reason of the injunction with respect to the matters in the pleadings mentioned; the plaintiffs, by their counsel, undertaking

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to abide by any orders which the Court may direct as to damages; the plaintiffs allowing the defendant White to use and occupy rooms in the house in the pleadings mentioned for two months, or until further order, with right of access at all reasonable times to the other rooms of the house for the purpose of removing his stock and property; with liberty to all parties to apply.

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RIDGWAY v. NEWSTEAD.

A mortgagee of leaseholds, who took no steps for fourteen years to realise his security—*Held*, entitled to recover the deficiency arising on the sale of the security against the general assets, but not against legatees who had been paid.

The right of a creditor to make legatees refund may be lost by laches, acquiescence, or by such a course of dealing as would render the assertion of such right inequitable.

THOMAS NEWSTEAD, of Dunham, in the county of Nottingham, by an indenture of mortgage, dated the 8th day of December, 1838, in consideration of a sum of 3000*l.*, conveyed and assigned certain leasehold premises, of which he was possessed, together with the buildings and machinery thereon, to Joseph Ridgway, his executors, administrators, and assigns, for the residue of the said term, subject to a proviso for redemption on payment of the said sum of 3000*l.* with interest at 5*l.* per cent. Thomas Newstead covenanted for himself, his heirs, executors, and administrators, in the usual way, with Joseph Ridgway, his executors, administrators, and assigns, for the due payment of the principal monies, and interest, at the rate of 5*l.* per cent.

Joseph Ridgway died in the lifetime of Thomas Newstead, having appointed the plaintiffs and one Robert Andrews his executors and administrators.

Thomas Newstead, by his will, dated the 16th of November, 1842, devised all his freehold, copyhold, and leasehold estates, in the parishes of Dunham and Loneham, in the county of Nottingham, to his son, T. W.

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Newstead, since dead, his heirs, executors, administrators, and assigns; and the residue (excepting certain specific legacies to his son) of his real and personal estate he devised and bequeathed to his son, the defendant W. M. Newstead, and his daughter Lydia, their heirs, executors, administrators, and assigns, upon certain trusts, to sell and convert, therein mentioned, with a right to his son to purchase part of the real estate, and upon trust as to the proceeds of the said sale, in the first place, thereout to pay all his just debts, funeral and testamentary expenses; and subject thereto on certain trusts therein mentioned, and, *inter alia*, on trust, to raise and levy a sum of money, the yearly interest and dividends whereof would amount to 350*l.*, and to lay out and invest the said sum of money upon Government or real securities, and thereout to pay (*inter alia*) an annuity of 150*l.* to Mr. J. T. Newstead for life; and upon further trust, to lay out and invest the sum of 2000*l.* on Government or real securities, and to pay the interest and dividends thereof to his daughter, Mary Ann Boord, and her assigns, for her separate use for life; and after her decease, to pay and transfer the principal monies to her child, or children, if more than one, as tenants in common, to be paid to him, her, or them, on attaining twenty-one.

The testator then gave the said residue of all the said monies equally between his son W. M. Newstead, and his daughter Lydia, whom he also appointed executor and executrix and residuary devisees and legatees of the said will, by whom his will was proved on the 30th of March, 1843. Lydia subsequently married the defendant Thomas Cheadle.

At the death of Thomas Newstead, the sum of 3000*l.* and an arrear of interest was due on the said mortgage.

In November, 1856, Joseph Fox, who was the mortgagee of the share of W. M. Newstead and Lydia Cheadle in the testator's residuary real and personal estate,

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filed his bill against J. T. Newstead for the purpose of enforcing his security. On the 5th of December, 1857, by a decree in that cause, it was declared that J. T. Newstead, as heir-at-law of T. W. Newstead, who had become liable for the debt due to Fox, should, on satisfaction of such debt, stand in the place of the said Fox. The said J. T. Newstead had accordingly paid off the debt due to Fox, and prosecuted the suit in the decree in *Fox v. Newstead*. Under the decree, the real estate of the testator (except such part as had been sold previously) not specifically devised had been sold, and the purchase-money, amounting to 1182*l.* 12*s.* 9*d.*, paid into court to the credit of the cause.

The real estate was sold, but was insufficient to pay the plaintiff.

The legacy to Mary Ann Boord was paid into court by the executors of the testator, and invested. On the 17th of October, 1852, Mary Ann Boord died, leaving three infant children.

On the 9th of May, 1857, the executors of Ridgway filed their bill against W. M. Newstead, T. Cheadle, and Lydia, his wife, and one Tyrer, who claimed an interest in the machinery, stating the death of J. Ridgway, and that the plaintiffs were the executors of his will, and that the sum of 2730*l.*, together with certain arrears of interest, costs, charges, payments, and expenses, on account of ground-rent, were due to the plaintiffs from the estate of the said Robert Newstead. The bill then prayed that an account might be taken of what was due on the said mortgage, and the amount paid to the plaintiffs; and secondly, that in default of payment the said premises might be sold, and the monies to accrue from such sale might be applied in satisfaction of what should be found due; and that if the proceeds of the said sale should be insufficient to satisfy the said debt and costs, that the deficiency might be made good out of the estate of the said Thomas Newstead.

That the defendants might admit assets, or that the usual accounts might be taken and the estate of the said testator administered in due course; and in such case, that the suit might be taken as a suit on behalf of the plaintiffs and all other the unpaid creditors of the said Thomas Newstead.

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On the 21st of January, 1858, the case came on at the hearing, when a decree was made directing an account of what was due to the plaintiffs for principal and interest, charges and expenses properly incurred, and the costs of suit. And it was further ordered that, on payment by the defendants to the plaintiffs, within one month after the date of the certificate, of what should be found due, the mortgaged premises should be re-conveyed to the defendants; and in default of payment, that the said premises should be sold, and the proceeds applied in payment of what should be certified to be due to the plaintiffs as aforesaid; but in case the same should not be sufficient, then there should be the usual administration decree.

On the 24th of May, the chief clerk certified that there was due to the plaintiffs for principal, interest, costs, and expenses, the sum of 3285*l.* 16*s.* 1*d.*, and a day was fixed for the payment thereof, but it was not paid, and the premises were sold.

On the 23rd of April, 1859, the chief clerk further certified that the defendants had made default in the payment of the said monies, and that the premises had been sold for 850*l.*, and there still remained due to the plaintiffs 2553*l.* 3*s.* 8*d.* The certificate also found that W. M. Newstead was indebted to the testator's estate in the sum of 18,662*l.* 7*s.* 1*d.*, but that he claimed to be allowed 18,726*l.* 10*s.* 4*d.*, which the chief clerk had not allowed, as there were no vouchers of such payment produced.

The certificate also found that T. Cheadle, and Lydia, his wife, had received of the personal estate 101*l.* 7*s.* 1*d.*,

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which was still due from them, and that they had received 100*l.* and 718*l.* 15*s.*, which, by an order dated the 15th of February, 1859, they had been ordered to pay into court. The chief clerk also certified that the outstanding estate of the testator consisted of certain particulars stated in the certificate, but was irrecoverable.

On the 31st of May, 1859, the chief clerk further certified that part of the sums disallowed by him in the former certificate consisted of a sum amounting to 2012*l.* 2*s.* 6*d.*, which had been paid to J. T. Newstead on account of the annuity given by the will, and also of a sum of 1980*l.* which had been paid by Newstead's executors into court under the Trustee Relief Act, to an account headed *Re T. Newstead's will*, and the account of the legacy of Mary Ann Boord and her children; the money so paid in had been invested in the purchase of 2275*l.* 16*s.* 10*d.* three per cent. Consols.

On the 5th of July, 1859, his Honour ordered the defendant Newstead, within one month after service of the order, to pay into court, to the credit of the cause, the balance found due from him, amounting to 18,662*l.* 5*s.* 1*d.* The order also directed T. Cheadle, and Lydia, his wife, within the same time, to pay into court the sum of 718*l.* 15*s.* It was directed that, in default of payment, the plaintiffs were to be at liberty to take proceedings as to the sum of 2012*l.* 2*s.* 6*d.*, paid by J. T. Newstead, and to apply to the Court in respect of the legacy to Mary Ann Boord and her children, which had been paid into court under the Trustee Relief Act, and the interest and stock on which had been laid out.

The further consideration of the cause was then adjourned.

The order was served on the defendants, W. M. Newstead and T. Cheadle, Lydia Cheadle having died intestate shortly after the date of the order, and her husband

subsequently went out of the jurisdiction, default was made in the payment.

On the death of T. W. Newstead intestate in 1854, J. T. Newstead succeeded as his heir-at-law, and took possession of the real estate.

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On the 4th of January, 1860, the plaintiffs filed their supplemental bill, whereby they alleged that the balance of 2553*l.* 3*s.* 8*d.* was still due to the plaintiffs from the testator's estate, and prayed for a declaration that the monies received by the said defendant J. T. Newstead from the executors on account of the annuity were assets of the testator applicable to the payment of his debts; and for an account of the monies so received by the said defendant, &c.; and also that he might be ordered to pay the same into court, to the credit of that suit, in order that the same might be duly administered. The bill also prayed for a similar declaration as regarded the said sum of 1980*l.* so paid into court by the said executors in the matter of the trusts of the will as aforesaid, and the bank annuities and cash produced thereby, and for transfer of the same to the credit of the present cause, to be applied in payment of the testator's debts in a due course of administration; also for a declaration that the real estate specifically devised, and afterwards descended to the said defendant J. T. Newstead, remained in his hands as assets of the testator, applicable as aforesaid; and in case the monies paid in under the directions before prayed should be insufficient, then for an account of such real estate; and that out of the monies so recovered the plaintiffs might be paid the balance found due to them, and their costs of the suit; also, that this suit might be taken as supplemental to the former.

The defendant J. T. Newstead, by his answer, insisted that the proceedings in the former suit of *Ridgway v. Newstead* were not binding upon him, and he was advised

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they were in part irregular. He contended that the balance found by the certificate of the 23rd of April, 1859, as due from the defendant W. M. Newstead (who, he believed, never appeared in that suit), was a mere imaginary balance; that the statement in the certificate of the 31st of May, 1859, to the effect that sums amounting to 2012*l.* 2*s.* 6*d.* had been paid to him on account of his annuity, was incorrect; and that the parties sought to be affected by the last-mentioned certificate were not before the Court in that suit. He said that, in the early part of the year 1843, he agreed to sell his annuity under the will to the defendant W. M. Newstead and Lydia Cheadle for 2000*l.*; and by an indenture, dated the 16th of August, 1843, and made between him, the defendant, of the one part, and the defendants W. M. Newstead and Lydia Cheadle of the other part, such sale was carried into effect. The consideration therein expressed was the payment of 1400*l.* and the delivery of a note for 600*l.*, which was given to him by the said defendants W. M. Newstead and Lydia Cheadle, and was honoured in due course; the sum paid on it being 612*l.* 2*s.* 6*d.* He said that this transaction was perfectly *bonâ fide* on his part, and submitted that it was immaterial, so far as he was concerned, whether it was paid out of assets acquired by the purchasers as residuary legatees of the testator, or otherwise. He contended that the purchase-money of those parts of the testator's estate sold previously, as well as what might be received from W. M. Newstead and T. Cheadle, or the estate of Lydia Cheadle, ought to be applied in satisfaction of the plaintiff's claim before any part of the testator's estate specifically devised or bequeathed. He further contended that the legacy of 2000*l.* given to the Boord family was a mere pecuniary legacy, and therefore applicable to the payment of the testator's debts before the real estate specifically devised. He said that, upon the death of T. W. Newstead in 1854,

he entered into possession of the freehold estates which he inherited as heir-at-law to his brother, and had sold them all. He said that no payment had ever been made to him in respect of the annuity given to him under the testator's will, but that the sums mentioned in the bill, amounting to 2012*l.* 2*s.* 6*d.*, were received by him from the said defendants W. M. Newstead and Lydia Cheadle, as the price of his annuity, which they purchased from him. He submitted that, whether the monies so paid to him were or were not assets of the testator, it was unnecessary to inquire, as it in no way affected his title. Even if the Court were to decide that what had been paid could be made liable to the plaintiff's claim, the defendant submitted it could only be so after the fund in court in *Fox v. Newstead* had been exhausted, and rateably with the 1980*l.*

The defendants Boord, who were infants, by their answer said that, previously to and after the testator's death, the defendant W. M. Newstead carried on business as a brewer on the said mortgaged premises until 1856, when he failed, and up to that date the plaintiffs received interest on their debt from W. M. Newstead as the beneficial owner of the premises. For many years the said premises were an adequate security for the debt, but by reason of W. M. Newstead's failure and the discontinuance of the brewery business, the value of the premises became diminished. The plaintiffs obtained an order in *Ridgway v. Newstead*, authorising them to become the purchasers of the said leasehold premises, and they accordingly became the purchasers of the premises and of the equity of redemption therein at the price of 850*l.* They submitted to the Court whether the plaintiffs were entitled to the declaration prayed by their bill in the second place; and in case the Court should be of opinion that the stock and cash standing in court to the credit of their legacy were applicable in or toward satisfaction of the mortgage-debt,

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then they submitted that the monies arising from the sale of the testator's estate not specifically devised were primarily liable to the discharge of the plaintiff's security, and that the plaintiffs ought to resort to such monies before they could claim to appropriate the fund belonging to the said defendant's fund.

Argument.

Mr. Bacon and Mr. H. Humphreys, for the plaintiff.

It is the admitted right of a creditor to call on the legatees to refund, *March v. Russel(a)*, or to obtain payment out of part of the estate which had been paid into court: *Gillespie v. Alexander(b)*, *Greig v. Somerville(c)*.

It might be a case of hardship, but that was no answer to the right of the creditor to follow the assets in the hands of volunteers: *Davies v. Nicolson(d)*.

[See also *Berrington v. Evans(e)*, *David v. Froud(f)*, *Sawyer v. Birchmore(g)*, *Catell v. Simons(h)*, *Underwood v. Hatton(i)*, and *Thomas v. Griffith(k)*.]

Mr. Elmesley and Mr. Wickens for the defendant J. T. Newstead, contended that the plaintiffs had no right to come against part of the assets when, as in the case of *Fox v. Newstead*, they might have proceeded in a due course of administration against the whole estate. At all events, they could in this suit, and against these defendants whom they had selected, obtain the same relief only that might have been attained in the administration suit.

Mr. W. D. Lewis and Mr. Greenside for the infant defendants, contended that, by retaining the leasehold and

(a) 3 M. & Cr. 31.

(b) 3 Russ. 130.

(c) 1 R. & M. 338.

(d) 2 De G. & J. 693.

(e) 1 Y. & C. 434.

(f) 1 M. & K. 200.

(g) 1 Keen, 391; s. c. 2 M. & C. 611.

(h) 8 Beav. 243.

(i) 5 Beav. 36.

(k) *Post*, p. 504.

the machinery, which were perishable chattels, the mortgagee had elected to rely on the security, and could not now come on the general estate, much less on part of the assets that had been duly appropriated. If a mortgagee was entitled to rest on his security, and see the whole assets distributed without losing his right against such assets, no estate could ever be distributed at all. The plaintiffs here are clearly guilty of laches.

[*Dilkes v. Broadmead*(a), was cited.]

Mr. Bacon.—A mortgagee was not bound to sell, and was not guilty of laches in not doing so. [The VICE-CHANCELLOR.—Will you take an inquiry whether there has been deterioration of the mortgaged property?] Such an inquiry would be useless, because if it was found that the property had become of less value, that circumstance could not affect the plaintiff's right. Possibly, had he come earlier, he might have been paid out of the general assets, but that was not the question; the defendants might have paid off the mortgage if they pleased at any time. It was submitted therefore, that the plaintiffs had been guilty of no laches.

[The case of *Fordham v. Wallis*(b) was referred to by his Honour.]

THE VICE-CHANCELLOR:—

I think the plaintiffs have established their right against the general assets of the testator standing in court to the credit of the cause of *Fox v. Newstead*. But as to the claim against the other legatees, who have been in part paid, and towards whose legacy an appropriation has been made out of the fund paid into court by the executors under the Trustees Relief Act, I feel the greatest doubt and difficulty.

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(a) *Ante*, page 113.

(b) 10 Hare, 217.

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It is alleged and not denied that, at the time of the testator's death, and for a considerable period afterwards, the mortgage property was worth more than the amount of the debt secured by it. There is an allegation in the infants' answer that this property, consisting of leasehold premises and machinery, was for many years after the testator's death considered an adequate security for the mortgage-debt, but, that by reason of the failure in business of W. M. Newstead, and the discontinuance of the brewery business, the property became diminished in value. And it is perfectly plain that fourteen years taken out of even a longer term, must in some degree diminish the value. But the proposition maintained at the bar is this—that if the mortgage property were worth ten times the value of the money secured by it, the mortgagee, being satisfied with his security, may exercise his choice not to claim as a creditor against the testator's general assets, and may assert his right to come for his money to the executor and residuary legatee, who has the beneficial interest in the surplus value of the mortgaged property beyond the amount of the debt, and is the owner of the equity of redemption. Here the mortgagee of the leasehold property is contented for fourteen years with his security, and makes no claim as a creditor until after the assets have been administered and the legatees paid. It seems to me that I must have some authority to show, in a case of this kind, where a part of the assets, consisting of the surplus of the leasehold mortgaged property, has been lost through delay; where the loss has been occasioned by the deliberate course of conduct of the mortgagee, acting in concert with the owners of the equity of redemption, which was part of the surplus assets; and where the loss has arisen from the deterioration in value of the mortgage property, that then, after lying by for fourteen years, the mortgagee is entitled to come upon those legatees whose legacy has been appro-

priated and secured, and who may have been in enjoyment of it for that period, and to ask that the property may in this court, as a matter of course, be administered. Without some authority, it is impossible for me to hold, upon principle, that the mortgagee has established his right as a creditor to make the legatees refund.

I have always understood that the right of a creditor to make legatees refund may be affected by the course of conduct of that creditor—that he may pursue such a course, by laches, acquiescence, or otherwise, as to make it highly inequitable for the Court to allow him to assert any right as against the legatees. At the same time, the case, on this particular question, has been argued with much less research than I could have wished. But if I am to decide it now, my opinion is, that the creditor, under the circumstances, is not entitled, as against these legatees, to make them refund or pay any part of his debt.

As to the general assets, a different principle applies, because the general assets could not have been distributed sooner. I think the plaintiffs have made a clear case to those assets which have been obtained under the decree of the Court within the last three years. Declare that, it appearing that the sum of 1182*l.*, arising in the other cause, is part of the general assets of the testator, it may be applied in payment of the creditors. As to the rest, the bill must be dismissed, but not with costs; not only by reason of the extreme difficulty of the question, and my doubts upon the case altogether, but because I think it is a case of common calamity.

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Where the chief clerk disallowed debts alleged to have accrued due after the testator's death, and distributed the assets, and the creditor, without moving to vary the certificate, filed his bill against the legatees alone for an account, and for repayment of monies paid after the certificate on a continuing obligation of the testator, the Court held the suit maintainable.

THOMAS v. GRIFFITH.

THIS suit was instituted to establish against the residuary legatees, under the will of William Griffith, deceased, a debt claimed by the plaintiff—part of the debt having been disallowed by the chief clerk's certificate, in a suit for the administration of Griffith's estate, and the remainder having accrued due since the date of the certificate. The bill alleged that an agreement had been entered into in 1854, between Owen Thomas, the plaintiff, and W. Griffith, to take a lease of a plot of land at Llandudno, in North Wales, and to erect thereon a hotel and other buildings, at their joint expense. After the lease had been granted and the hotel built, a second agreement was entered into between the plaintiff and Griffith, by which Griffith agreed to take the lease and hotel off the plaintiff's hands, to repay him such sums as he had already advanced on account of the hotel, and to indemnify him against future claims in respect thereof, and also to pay him a further 100*l.*, by way of bonus, as remuneration for his trouble. This agreement, by reason of Griffith's death shortly afterwards, was never reduced to writing, but it was admitted by the answers.

Griffith had, at the time of his death, repaid to the plaintiff all the sums expended by him on account of the hotel, except 30*l.* 9*s.* 3*d.*, and he had also paid him 50*l.*, part of the 100*l.* bonus. There were, however, considerable outstanding debts due to tradesmen and others for work done and materials provided in respect of the hotel.

Shortly after Griffith's death, a suit of *Griffith v. Tittey* was instituted, for the administration of his estate, in which a decree was made in August, 1855. After that

decree, the plaintiff was pressed for payment of the outstanding debts due on account of the hotel, and having paid part of these debts, in April, 1856, he carried in a claim before the chief clerk, under the decree, for the amount (82*l.* 10*s.* 3½*d.*), and also for the 306*l.* 9*s.* 3*d.*, and the balance of the 100*l.* bonus. The chief clerk, by his certificate, allowed the two latter items, but disallowed the 82*l.* 10*s.* 3½*d.*, upon the ground apparently that it did not constitute a debt due from the testator at the time of his decease. The plaintiff now moved to vary the certificate. The final decree in the suit of *Griffith v. Tittey* was made in July, 1856, under which the assets were distributed among the defendants.

Subsequently the defendants called upon the plaintiff, as the legal joint owner of the hotel, to assign his interest therein to them. This he did by an indenture, dated the 30th of August, 1856, which recited the second agreement between Griffith and the plaintiff, and recited that all monies due under it had been paid to the plaintiff. In a note to the margin of the draft deed, however, the plaintiff's solicitor had stated that this was to be without prejudice to the plaintiff's claim to monies paid by the plaintiff on behalf of Griffith's estate since his death. The plaintiff, after the execution of the deed, was called upon to pay various other sums on account of the hotel, making, together with the 82*l.* 10*s.* 3½*d.*, the aggregate sum of 183*l.* 13*s.* 8½*d.*

The present bill was filed against the Rev. Joseph William Griffith, the Rev. George Edward Ashley, and Catherine Ashley, his wife, and Richard Randolph Griffith, the residuary legatees under Griffith's will, praying for a declaration that, notwithstanding the indenture of August 30th, 1856, he was entitled to stand as a creditor against the estate of William Griffith, and to be paid out of his assets the sum of 183*l.* 13*s.* 8½*d.* That, if necessary, an account might be taken, and that the defendants might

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be decreed to pay rateably and in proportion to their distributive shares, what should be found owing to him, or that he might be declared to have a lien on the hotel and buildings, and that, if necessary, direction might be given for giving effect to such lien. The legal personal representatives of William Griffith were not made parties to the suit. The defendants, by their answers, admitted assets sufficient to answer the plaintiff's claim.

Argument.
 —

Mr. Bacon and Mr. Osborne Morgan for the plaintiffs.

The plaintiff's claim as to the 82*l.* 10*s.* 3½*d.* is not barred by the chief clerk's certificate, because that sum, not being a debt due at the time of the decree, but a mere contingent liability, was not within the scope of the certificate: *Sterndale v. Hankinson*(*a*). Moreover, the finding of the chief clerk in one suit is not necessarily a bar to a claim in another, at least when the finding does not proceed on the merits: *Teed v. Beebe*(*b*), *Davis v. Combermere*(*c*), and as to a creditor's right to follow after a decree, that was clear: *Gillespie v. Alexander*(*d*).

Moreover, the plaintiff's claim was expressly excepted by the notes in the margin of the draft deed.

As to the residue of the claim, it had not arisen at the time of the certificate, and could not, therefore, be brought forward at that time.

[See also *King v. Malcott*(*e*) and *Barker v. Rogers*(*f*).]

Mr. Malins and Mr. C. Hall for the defendants.—The certificate of the chief clerk has made the matter *res judicata*, not only as to the 82*l.* 10*s.* 3½*d.*, but as to the residue. The one was a debt actually due at the time of the certificate, and the other, though not actually due,

(*a*) 1 Sim. 393; Seton on Decrees, p. 57.

(*b*) Not reported.

(*c*) 15 Sim. 394.

(*d*) 3 Russ. 136.

(*e*) 9 Hare, 692.

(*f*) 7 Hare, 19.

was an ascertainable claim. The plaintiff's proper course would have been to move to vary the certificate, and to set apart a certain sum out of the assets to meet the further claim. Not having done so, he was barred by the decree: *Sawyer v. Birchmore* (a), *David v. Frowd* (b). They also relied on the plaintiff's laches, and insisted that Griffith's legal personal representatives should have been sued as parties.

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THE VICE-CHANCELLOR (without calling for a reply):—

Judgment.

If the bill had been filed only to recover the sums disallowed by the chief clerk, the plaintiff would have had great difficulty in maintaining the suit.

It is a rule of this Court, that a creditor, whose claim has been disallowed in a suit to administer his debtor's estate, and who acquiesces in that decision, by taking no steps to vary the certificate, or to make the executors liable, cannot file a bill, or bring an action against those among whom the assets have been distributed. Such is the general rule, but it is subject to some exceptions. Where, for example, a creditor claims a balance due to him on a complicated account against the estate, and the chief clerk disallows the claim, it would be going too far to say that the creditor is precluded by the certificate from having the accounts taken in the usual way.

In this case, the plaintiff brought in his claim on the administration suit, and the chief clerk allowed the payments made during the testator's lifetime, but disallowed those made after his death. It is obvious, if such be the right view of the facts, the plaintiff might have succeeded in varying the certificate. Moreover, the payments disallowed were made in respect of a continuing obligation on the part of the estate; and one part of the present claim is for payments on which the opinion of the chief clerk could not have been taken, as they were made after

(a) 1 Keen, 391; s. c. 2 M. & C. 611. (b) 1 M. & K. 200.

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the date of the certificate, and after the assets had been distributed.

It has been contended, that the plaintiff might have gone in to establish his claim, and then have applied to have a sufficient amount set apart to answer such claim. Possibly he might, but his omission to do this is no reason for holding that his demand, on which no judgment has been in fact given, is a *res judicata* on the whole case. The plaintiff has established his right to an account of those claims arising from the continuing obligation of the testator, and of those sums paid by him on account of the testator, in pursuance of the agreement contained in the bill, including those sums which have been in part disallowed. It may be on the result of the account that the plaintiff has no claim, and if so, the bill will be dismissed with costs.

There is, however, this difficulty in the case. This is a bill, not against the executors, but against the legatees, who have been paid under the administration decree; the proper persons to resist the claim are the executors, and they are not before the Court; and the executors, it is said after the decree, might have destroyed the documents. It is to be observed, that the executors are exonerated by the decree; they are not before the Court, but the mere claim of the plaintiff must have shown the executors that the matters of the estate were not finally settled; but however that may be, the defendants are mere beneficiaries, and cannot hold the assets against creditors. Unquestionably it is objectionable to have an account taken in a suit in the absence of the legal personal representative, but it seems in this case unavoidable.

The case of *David v. Frowd*(a), decided by Sir John Leach, clearly shows that a creditor is entitled to maintain such a suit as this, unless he has been guilty of wilful default. In this case no wilful default has been

(a) 1 M. & K. 200.

shown, though the creditor has not followed the usual course.

In *Sawyer v. Birchmore*, Lord Cottenham was dealing, not with a creditor, but with the next of kin, who was bound to show he had not been guilty of laches; but that case has no application to the right of a creditor.

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WADE v. JENKINS.

Nov. 20th.

THE question raised on this bill was whether, on the construction of the articles, the goodwill of the business ought to be estimated in making out the share of a deceased partner.

The bill stated that the late Sir Charles Ogle, at the time of his death, carried on the business of a brewer at the Lion Brewery, Belvedere Road, Lambeth, in partnership with the defendant Henry Jenkins. The style of the firm was Goding & Co., and had formerly consisted of three persons, of whom once had since retired.

By articles of partnership between Sir Charles Ogle and Henry Jenkins, dated the 31st of March, 1855, it was agreed that the partnership should continue for fifteen years from the 30th of March, 1855, unless the same should be determined earlier.

By indenture indorsed on the articles of partnership, dated the 9th of November, 1855, between the said Sir C. Ogle of the one part, and the defendant of the other part, it was recited that 90,000*l.* was the capital of the said partnership within the meaning of article 18, and it was witnessed and agreed between the parties that they should stand possessed of and be en-

Where articles of partnership provided that "the goodwill should belong to the partners in the proportion of their shares in the business, but should not be taken into account in the accounts of the partnership;" and that "on the determination of the partnership, a general account and valuation of the property and effects of the partnership should be taken," on the death of one partner—*Held*, that, in the valuation of the partnership property, the goodwill must be included.

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titled to the said partnership estate and effects in the following proportions—Sir Charles Ogle to five-ninths, and the defendant to four-ninths thereof.

The articles, so far as material to the question now before the Court, were as follows:—

“ 18. The capital of the partnership shall consist of, first, the freehold and leasehold properties, fixed and moveable plant, stock-in-trade, monies, mortgage and other securities, books, debts, credits, and effects of the late partnership; secondly, the brewery and public-houses, and beershops, and shares therein respectively, and other property to be demised and assessed respectively to the partners by the said James Goding; and thirdly, the other property and effects from time to time belonging to the partners, and by them employed in the business.”

“ 24. For the purposes of the said articles of partnership, the goodwill of the business shall be deemed to be of the value of 6000*l.*, and to belong to the partners in the same proportions as those in which they respectively were entitled to the capital of the partnership; but the value of the goodwill shall not be taken into account in any of the accounts between the partners or between the partnership and either of the partners.”

“ 49. On the determination of the partnership, at whatever time and by whatever means, a general account and valuation of all the property, effects, and liabilities of the partnership shall be made up and settled by and between (as the case may be) the partners, or the surviving partners and the executors or administrators of the deceased partner, or the respective executors or administrators of the deceased partners; and the irrelative claims on, or shares and interests in the partnership, and the property and effects thereof, shall be ascertained.”

“ 50. If either partner die before the expiration of the

partnership term of fifteen years, the partnership shall thereupon determine."

" 52. In the event of the determination of the partnership by the death of either of the partners, the surviving party shall, within two calendar months after such determination, give to the executors or administrators of the deceased partner his bond or obligation, to be thereunder written, for securing the payment to them of the amount of the share of the deceased partner of the capital of the partnership, and the interest thereon, and, subject to such payment being duly made, the property and effects of the partnership shall, as from the time of such death, belong to the surviving partner."

Sir Charles Ogle died on the 16th of June, 1858, having appointed the plaintiff his executor. After his death, the plaintiff employed Mr. Norton, of Old Bond Street, to investigate the affairs of the partnership, and that gentleman, having examined the accounts, made his estimate, in which, allowing the sum of 3333*l.* 6*s.* 8*d.* as Sir Charles Ogle's share of the goodwill, he made the total amount of his share of the assets the sum of 29,189*l.* 3*s.* 6*d.*, for which, under the articles, the surviving partner was to give his bond. Some dispute subsequently arose as to the accuracy of the details of accounts and of the principle on which they had been prepared. The plaintiff's solicitors wrote to the defendant to know whether he was willing to accept the account and give a bond; in reply to which, the defendant wrote to the plaintiff's solicitor as follows:—

" I must decline to do either, as the account referred to contains an item at credit of 3333*l.* 6*s.* 8*d.* for a share of an assumed goodwill, the claim to which I positively decline to recognise.

" Yours,

" HENRY JENKINS."

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The plaintiffs thereupon filed this bill for an account and valuation of the partnership assets at the date of the testator's death, and of the testator's interest therein.

The bill also prayed that it might be declared that the sum of 6000*l.*, the agreed value according to the articles of partnership of the goodwill of the business, was to be taken into account; that the plaintiff's share, as executor in the capital, might be secured pursuant to the articles; that the defendant might be decreed to execute a bond for that purpose.

Argument.
 —

Mr. *Bacon* and Mr. *Osborne* for the plaintiff, contended that, on the construction of the articles, the goodwill formed a part of the assets. The provision that it was to form no item of account applied only during the continuance of the partnership; any other construction was quite inconsistent with the provision that it was to be of the value of 6000*l.*

Mr. *Malins* and Mr. *Speed*, for the defendant, contended, that the Court could not make a new contract for the parties. Here it was distinctly stipulated that the goodwill was not (article 49) to be taken into account in any account between the partnership. The account directed in the 52nd article must mean such an account as was contemplated in article 49. It was submitted, that the goodwill ought not to be included.

Judgment.
 —

THE VICE-CHANCELLOR :—

The 24th article of the deed of partnership seems to me to be expressed in very plain terms. It says that "the goodwill of the business shall be deemed to be of the value of 6000*l.*, and to belong to the partners in the same proportions as those in which they respectively were entitled to the capital of the partnership." The goodwill is to belong to the partners, but, as between the

partners, it is to be taken to be of the value of 6000*l*. Then there is this qualification, that "the value of the goodwill should not be taken into account in any of the accounts between the partners, or between the partnership and either of the partners." I think that is very intelligible too; for, in taking accounts between the partners, or of either of them in the concern during the currency of the partnership, great inconvenience would arise by including the goodwill as an item in the account. It was consequently agreed that it should not be included. Article 49 of the deed provides for what is to be done in the event which has happened of the death of one of the partners, and the determination of the partnership. It provides that, "on the determination of the partnership, at whatever time, and by whatever means, a general account and valuation of all the property, effects, and liabilities of the partnership should be made up and settled by and between the surviving partner and the executors of the deceased partner." Now it has been said that a general account and valuation of the property means the same thing as an account between the partners themselves. The language of the clause is different. Upon the true construction of these articles of partnership, there must be a declaration that, in the general account and valuation directed by article 49, the value of the goodwill is to be estimated. There will be liberty to apply.

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Dec. 5th & 6th.

1861,
Jan. 31st.

BOOTH v. COULTON.

It is an established rule of this Court, that an annuitant under a will is not entitled to interest on the arrears of his annuity.

Litton v. Litton (a), Aylmer v. Aylmer (b), Torre v. Browne (c), considered.

JOHN GILLYATT BOOTH, by his will, dated the 20th of September, 1849, devised and bequeathed to his executors therein named all and singular his real and personal estate, "upon trust to pay all his just debts and funeral and testamentary expenses, and to pay the legacies or sums of money therein mentioned," and upon further trust, "out of the annual profits of the residue of his said estates," to pay to testator's son, Philip Booth the annual sum of 400*l.* during his life; to William Bachelor the annual sum of 100*l.* during his life, and to Sophia Coulton the annual sum of 600*l.* during her life.

The testator further directed that the said legacies and the annuities thereby given should be paid to the legatees free of legacy duty, which the testator charged upon the residue of his estate. Subject as aforesaid, he directed that his executors should stand seised and possessed of all his real and personal estate, upon trust to apply the rents, issues and profits to and for the maintenance and benefit of his son, the plaintiff George Booth, for life, as the said executors and trustees should think fit, and from and after his decease, he devised and bequeathed all and singular the residue of his said real and personal estates to his said son Philip Booth, his heirs, executors, and administrators, subject nevertheless to certain trusts in an event which had not happened.

The testator died on the 16th of October, 1849, without having revoked his said will.

His son, George, at and prior to the date of his will,

(a) 1 P. Wms. 541.

(c) 5 Ho. Lds. Ca. 555.

(b) 1 Molloy, 87.

had been found of unsound mind, and John Booth had been appointed his committee.

The present bill was filed to administer the estate of the testator, alleging that the trustees had paid the debts, including a mortgage debt, out of the income, instead of out of capital, the result of which was, that the annuities had fallen into arrear. The plaintiffs claimed to have interest on the arrears of the annuity.

In July, 1857, a decree was made, in pursuance of which the chief clerk made his certificate, disallowing interest on the arrears of the annuities. The chief clerk certified as follows:—"The said P. Booth claims the sum of 352*l.* 19*s.* 10*d.* for interest on the arrears of his annuity; and the said S. Coulton claims the sum of 517*l.* 8*s.* for interest on the arrears of her annuity; and the said W. Bachelor claims the sum of 88*l.* 13*s.* 7*d.* for interest on the arrears of his annuity. I have not allowed such claims."

A summons was taken out to vary this part of such certificate, by allowing such monies.

The chief clerk also certified that, "regard being had to the sums which have been paid out of the income of the said testator's estate in discharge of mortgages and other debts of the said testator, there is due to the plaintiff G. Booth, the lunatic, in respect of his life-interest in the said testator's real and personal estate under his will, the sum of 16,158*l.* 17*s.* 6*d.*"

The summons also asked to have this varied, by adding, instead of the sum of 16,158*l.* 17*s.* 6*d.*, "such a sum as would be equal to the amount of such life-interest, calculated from the period when the clear residue of the testator's real and personal estate was ascertained;" and that it might be referred back to the chief clerk to ascertain such amount.

The summons was adjourned into court.

The testator at his death was entitled to freehold and

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copyhold premises at Brentford and Cow Cross, Smithfield, which with valuable plant and machinery were used as distilleries, and were let at a rent of 2300*l.* a year upon a lease which expired at Midsummer, 1859. The executors applied the whole of the personal estate, as far as it went, in payment of debts, and then they applied the rents of the distilleries to the same purpose. The other property of the testator was situated at Crouch End, Hornsey, yielding about 300*l.* a year, and mortgaged to a Mr. Allington for 14,000*l.*, and could not be sold without the mortgagee's consent, which he declined to give.

The suit of *Booth v. Allington* had been instituted to take an account of what was due on that mortgage.

Argument.
 —

Mr. *Elmsley* and Mr. *W. W. Mackeson*, appeared on the summons for Philip Booth.

Upon principle, interest ought to be given on arrears of annuity; and though, undoubtedly, there are cases in which the Court has determined otherwise, the decisions were not uniform. In *The Attorney-General v. The Brewers' Company* (a), the Court directed interest to be paid from the date when the Master's report was confirmed. In *Litton v. Litton* (b), the Court, in conformity with Lord Cowper's decree, held that an annuity should "carry interest from the very day when it became due, and not only from the subsequent day of payment after the arrears were due."

In *Batten v. Earnley* (c), the principle of giving arrears was recognised in case of "great arrears as here." In *Ferrers v. Ferrers* (d), interest was given. In *The Drapers' Company v. Davis* (e), the Court gave interest for twenty-eight years' arrears. In *Robinson v. Cumming* (f), the

(a) 1 P. Wms. 376.

(b) Ibid. 541; s. c. 2 Eq. Cas. Ab. 530.

(c) 2 P. Wms. 162; 2 Eq. Cas. Ab. 456.

(d) Cas. temp. Talbot, 2.

(e) 2 Atk. 211.

(f) Ibid. 409—411.

Court held, that where an annuitant had entered into possession of an estate charged with the annuity, the Court would not compel him to quit possession until the grantor allowed him interest on the arrears. In *Newman v. Auling(a)*, the Court gave interest at four per cent. on the arrears of an annuity given for maintenance. In *Stapleton v. Conway(b)*, interest was given; and in *Morris v. Dillingham(c)*, the Court held that interest on the arrears of an annuity was discretionary, but that it ought to be given in a proper case.

[*Anon.(d)*, *Grosvenor v. Cook(e)*, *Morgan v. Morgan(f)*, *Hyde v. Price(g)*, *Crosse v. Bedingfield(h)*, *Martyn v. Blake(i)*, *Mansfield v. Ogle(k)*, were cited.]

Mr. Malins and Mr. Bilton for the plaintiffs.

The well-settled rule of this Court is that interest is not payable on the arrears of maintenance, or of a jointure: *Mellish v. Mellish(l)*.

The cases which had been cited, were either distinguishable or had been overruled, and *Litton v. Litton(m)*, in particular, had never been followed. In *The Duke of Bedford v. Coke(n)*, Lord Hardwicke emphatically said, "I will give no interest for the arrears of voluntary annuity." [The VICE-CHANCELLOR.—The question in that case was whether Dr. Young was to be preferred to the appointee of the Crown, and the case was argued throughout on the right of the Crown.] The decision was on the broad principle that the arrears of an annuity did not carry interest.

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(a) 3 Atk. 579.

(b) 1 Ves. sen. 428.

(c) 2 Ves. sen. 170.

(d) Ibid. 661.

(e) 1 Dick. 305.

(f) 2 Dick. 643.

(g) 8 Sim. 578.

(h) 12 Sim. 35.

(i) 3 Dr. & W. 125.

(k) 4 De G. & J. 38.

(l) 14 Ves. 516.

(m) 1 P. Wms. 451.

(n) 2 Ves. Sen. 117.

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In *Creuze v. Hunter*(a), the whole subject was maturely considered by Lord Loughborough, who endeavoured, without success, to find any good authority for giving interest. He said, however (page 163), that he had been unable to find any case in which interest had been given for the arrears of an annuity. The case of *Tew v. Winterton*(b) was a case that eminently called for indulgence, but the Court refused to relax the rule on the "loose ground of compassion." The language of the Lord Chancellor Thurlow(c) was, "that the cases where the Court has given interest are where trustees or executors are bound by their duty and trust to make payments regularly, and have kept money in their hands. Here the Court has upon further directions given interest.

Then as to the cases cited on the other side, they had no application, or were against the argument. In *Robinson v. Cumming*(d), Lord Hardwicke said there was no case where the Court had allowed interest. In *Newman v. Auling*(e), interest was allowed, but expressly as maintenance; and Lord Thurlow, in *Tew v. Winterton*(f), in which that case was cited, declined to follow it, and confirmed the general rule. In *Batten v. Earnley*(g), the executor said he would go to gaol, and leave the legatees unpaid, and did leave the annuities, which were payable quarterly, to fall into arrear for three years. *Mellish v. Mellish*(h) was a case of maintenance. *Grosvenor v. Cook*(i) was a case of creditors. In *Morgan v. Morgan*(k) the Court gave interest expressly on the ground that the annuitant was prevented by the injunction from enforcing payment of the annuity.

(a) 2 Ves. 157.

(b) 3 Brown, 489; s. c. 1 Ves.
451.

(c) Ibid. 452.

(d) 2 Atk. 409.

(e) 3 Atk. 579.

(f) 1 Ves. 451.

(g) 2 P. Wms. 162.

(h) 14 Ves. 516.

(i) 1 Dick. 305.

(k) 2 Dick. 643.

In *Mansfield v. Ogle*(a) the opinion of Lord Justice Turner was against the principle. Lord St. Leonards also held the same view in *Martyn v. Blake*(b). In *Anderson v. Dwyer*(c) it was distinctly decided that arrears of an annuity, given to the sole and separate use of a married woman, did not carry interest. Then came *Booth v. Leicester*(d), in which Lord Cottenham reviewed all the authorities, and held that the uniform rule of the Court was that no interest would be given on the arrears on an annuity. [The VICE-CHANCELLOR.—In *Aylmer v. Aylmer*(e) Sir Anthony Hart had occasion to consider the question, and came to the conclusion that he would not break in on the settled rule.] In *Torre v. Browne*(f), Lord Cranworth laid down the same principle; and it was remarkable that in that case *Litton v. Litton* was not even cited.

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[The cases of *Taylor v. Taylor*(g), *Creuze v. Lowth*(h), and the statutes of 3 & 4 Wm. 4, c. 42, s. 28, and 1 & 2 Vic. c. 110, s. 17, were also referred to.]

Mr. Bacon and Mr. Hardy for the trustees.

Mr. Greene and Mr. Browne, Mr. Lewis and Mr. Colt, for other parties.

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The question is as to the right of annuitants to have interest calculated on the arrears of their annuities. The case has been very carefully and ably argued at the bar by Mr. Elmsley on behalf of the annuitants' claim; and

(a) 4 De G. & J. 38.
(b) 3 Dr. & W. 125.
(c) 1 Sch. & L. 301.
(d) 3 M. & C. 459.

(e) 1 Molloy, 87.
(f) 5 H. Lds. Ca. 577.
(g) 8 Hare, 12.
(h) 4 Bro. C. C. 316.

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he has called my attention to a great number of authorities. I have read through all the cases cited at the bar, and several other cases having relation to the same question. I entertained a strong impression in favour of the right and justice of the claim of the annuitants. But the current of authorities is too strong. It seems in all the cases to be considered as a general rule that interest is not payable on the arrears of an annuity. During the argument, a case of *Torre v. Browne* was cited. I also referred to a case of *Aylmer v. Aylmer*, before Sir A. Hart in Ireland; and the result of these decisions seems to be, that annuitants cannot be allowed interest on the arrears. The chief clerk's certificate must, therefore, remain unaltered. It is remarkable that the question never seems to have been argued or decided upon the simple question, whether in the distribution of assets as between ordinary legatees and annuitants, interest should be allowed. All the reported decisions were on cases in which, upon some particular ground suggested of hardship or peculiarity, the Court asked to allow interest; and it is to be inferred from all the reported cases, that, except under extraordinary circumstances, interest is not to be allowed.

SPRINGETT v. DASHWOOD.

1860
 Dec. 9th.

JOHAN DOTTERILL, being indebted to several persons, by a deed, dated April, 1856, conveyed certain freehold hereditaments and premises unto and to the use of H. Dashwood, T. Gray, and Thomas Randall and their heirs, upon trust, to sell and stand possessed of the proceeds of sale, upon the trusts declared by an indenture of even date therewith.

By that deed the said John Dotterill assigned to the trustees all his stock-in-trade, goods, household furniture, and plate, debts, money, and all other personal estate whatsoever, upon trust to collect and receive, "and after the expiration of six calendar months" therefrom, "or sooner if thereto required by the said John Dotterill," to sell the saleable part thereof. The deed provided that the trustees were to stand possessed of the proceeds of the sale of real estate, and of the said real estate until sold, and of the personal estate, upon trusts for the creditors as therein mentioned. It was further provided that it should be lawful for the said trustees, and they thereby agreed, to make to the said John Dotterill an allowance or return to him of part of his household furniture and effects; also, that it should be lawful to employ the said John Dotterill in getting in the estate, and in carrying on his trade, if considered advisable, and to allow him and any other person so employed as aforesaid, out of the trust estate, such sums as to the said trustees should seem proper and reasonable. The trustees were authorised to make an arrangement with the creditors whose debts were under 10*l*. It was also provided that any resolution signed by the majority in number and value of the creditors as to postponing the

Where trustees for creditors neglected, on the application of a creditor, to furnish an account of the trust estate, and the creditor filed his bill, to which the trustees put in an answer, setting forth an account substantially correct—the Court made the acting trustee pay the plaintiff's costs to the hearing, but gave both trustees their subsequent costs out of the estate.

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sale should be binding; and the creditors, parties thereto, thereby acquitted and released the said John Dotterill.

Under the deed, John Dotterill was permitted to retain certain articles of trade, and had power to pay the creditors under 10*l.* in full, and to compound with creditors who had commenced proceedings.

Thomas Gray died in 1856. In July, 1857, the trustees paid a dividend of 6*s.* 8*d.*, and in May, 1858, a second dividend of 3*s.* 4*d.* in the pound. Several of the smaller creditors were paid by the insolvent himself.

The plaintiff, being anxious to get an account from the trustees, wrote a letter to Randall in November, 1856, asking what had been done in the matter of the trusts, who promised, in reply, to communicate with Dashwood. The plaintiff subsequently wrote to his solicitor.

On the 10th of May, 1858, he wrote to the defendant's solicitors at Gosport, as follows:—

“ Messrs. Field & Son, Gosport.

“ Gentlemen,—Mr. Springett has desired me to apply to you, as solicitors for the surviving trustees under this estate, for an account of receipts and payments by the trustees. He has always been informed that the estate would realise 20*s.* in the pound. I must beg, therefore, to receive the account in the course of the week.”

Neither Mr. Dashwood, the acting trustee, nor Mr. Randall took any notice of this letter, and the plaintiff, on the 20th of June, 1859, filed this bill on behalf of himself and all other the unsatisfied creditors of John Dotterill, who were entitled to come in and have the benefit of the said trust deeds, other than the defendants.

The bill alleged, first, that the defendant Dotterill was allowed to remain in possession of the freehold property, to receive the rents and profits of part, and to cultivate the rest for his own benefit; secondly, that he was per-

mitted to remain in possession of the whole of the household furniture, and that he was still in possession and enjoyment thereof; thirdly, that he was allowed to remain in the business, and to apply to his own use all the profits arising therefrom.

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The bill prayed for an account of the said trust estate. The defendant Dashwood, by his answer, admitted that, except as to one small property, the real estate had been allowed to remain in Dotterill's possession; that in April, 1856, the real estate was sold, and Dashwood received the proceeds. A mortgage was paid thereout, and the balance was accounted for as in the answer mentioned. The defendant also admitted that the trustees did not possess themselves of the goods and effects, nor receive any debts except two, the amounts of which were thereby accounted for. He admitted that no answer was returned to the letter of the 10th of May, and said that Mr. Field was unable to render the accounts, as he had no materials to enable him to do so, as the defendant Dashwood was absent from home. He admitted also leaving in the defendant Dotterill's possession the brewing utensils, carts, horses, and stock-in-trade, as the trustees could not carry on the business themselves, and to have sold would probably have been attended with heavy loss.

The answer contained a schedule setting forth an account of the personal estate of or to which the said John Dotterill was possessed or entitled at the date of the deeds, of his household furniture, farming-stock, &c., and a debt of 179*l.* also on account of the personal estate which had come to the hands of the trustees since the execution of the deeds, and how the same had been used in business or otherwise disposed of, and showed that of the above debt 79*l.* was still outstanding.

The other trustee, Randall, averred that he had not acted in the matter of the trusts, as he lived at a distance from Gosport.

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The plaintiff subsequently amended his bill, alleging that he had recently discovered that the defendants had allowed the said John Dotterill to collect and get in and apply to his own use portions of the said monies and premises as signed by the above deeds, and charging them with a breach of trust, and with wilful neglect and default, and praying for an account against them on that footing.

The bill also charged that Randall, having accepted the trusts of the deeds, was bound to perform and execute them, or at least to see that they were duly performed and executed by Dashwood; in particular that it was his duty to see that the estate was sold and converted. The bill also charged that the defendant Randall had never communicated with Dashwood as he had promised.

On the 13th of July, 1859, the cause came on for hearing, when, after directing certain accounts and inquiries, the Court ordered that "if on taking the several accounts it should appear that the said defendants Dashwood and Randall had, or either of them had, been guilty of wilful default, they or he were or was to be charged therewith."

On the 3rd of August, 1860, the chief clerk, by his certificate, found that there was a sum of 939*l.* 15*s.* 3*d.* still due to the persons entitled to the benefit of the indenture, that the real estate and part of the personal estate had been sold, and that there remained a sum of 73*l.* 16*s.* 4*d.* due from the defendant Dashwood on that account. That the plaintiff had sought to charge the defendants with the profits of the trade, but the chief clerk had not required any account of such trading, it appearing that the trustees did not, nor did the said John Dotterill, assent to carry on such trade for the benefit of his creditors.

The plaintiff had paid a sum of 39*l.* 2*s.* 10*d.*, the costs of the representative of the deceased trustee.

The cause now came on for further consideration.

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Mr. *Walker* and Mr. *Speed* contended that the trustees had been guilty of wilful default in not getting in the estate; and secondly, had neglected their duty in not forwarding the account required of them.

They contended also, that *Randall* having accepted the trust, was liable to the plaintiff, and they asked that both trustees should pay the costs.

[An anonymous case(*a*) was cited.]

Mr. *C. Swanston* appeared for the trustee *Randall*, and submitted that he had never in fact taken part in the trust.

Mr. *Wellington Cooper*, for the defendant, contended that the account furnished by the answer was substantially correct, and no good had resulted from the litigation. The Court, therefore, would disapprove of the plaintiff's proceedings, and give him no costs: *Ottley v. Gilby*(*b*). It was not shown that the defendants had been guilty of any misconduct, and they were therefore entitled to their costs.

[*Thompson v. Clive*(*c*), *White v. Jackson*(*d*), and *The Attorney-General v. Gibbs*(*e*), were also cited.]

THE VICE-CHANCELLOR:—

This case is important, because it has been argued with reference to the duties of trustees, who are accounting parties. Those duties have been explained and defined by judges of the highest authority. In the present case, the trusteeship was constituted for the benefit of creditors. Lord Eldon, in the case of *Clarke v. Lord Ormonde*(*f*),

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(*a*) 4 Madd. 273.

(*b*) 8 Beav. 602.

(*c*) 11 Beav. 475.

(*d*) 15 Beav. 191.

(*e*) 1 De G. & S. 156.

(*f*) Jac. 120.

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speaking of the case of trustees for the benefit of creditors, says this: "*Primâ facie* the creditors" (*i.e.* any of the *cestuis que trust*) "have a right to ask what was the value of the estates, the amount of the monies raised by sales and from the rents, and of the debts and incumbrances paid, and of those remaining unpaid. If the fact be, as it probably was, that an account was rendered, satisfying all these inquiries, by furnishing the particulars forming each of the totals which are the subject of inquiries, &c., then the plea should have been that such accounts were rendered," &c. Lord Eldon then goes on to deal with the plea of a settled account and release, and he treated such a plea as insufficient and informal, because it merely pleaded a settled account, and did not go on to state that all necessary or sufficient information had been afforded by the trustee to this *cestui que trust*. Therefore it was clearly the opinion of Lord Eldon, that one of the duties of a trustee to his *cestui que trust* is to afford him all reasonable and proper information in reference to the matters of the trust. Sir Thomas Plumer, in the case of *Pearce v. Green*, says, "It is not necessary to make an order in favour of this description of person; but, placing them in the same situation as others, they have a right to expect that those whose duty it is to keep accounts for them will do it. It was said that the accounts in this case were such as could not properly be taken except under the direction of the Court; but it would be lamentable, indeed, if it were to be laid down that a Chancery suit is necessary in these cases, before payment of the shares to the different parties. . . . It is the first duty of an accounting party, whether an agent, a trustee, a receiver, or an executor—for in this respect, as was remarked by Lord Chancellor Eldon, in *Lord Hardwicke v. Vernon(a)*, they all stand in the same situation—to be constantly ready with his accounts." In *Pearce v. Green(b)*,

(a) 14 Ves. 510.

(b) 1 Jac. & W. 135—140.

Sir Thomas Plumer decided that the defendants, by not keeping proper accounts, had rendered a suit necessary, and ought therefore to pay the costs. Sir John Leach, in the anonymous case in 4 Madd., found that application had been made to an executor for an account, and that he gave no account. The bill was filed; and by his answer the defendant stated the accounts; but the plaintiff took a decree for an account. It turned out, on the Master's report, that the account given by the answer was correct. Sir J. Leach, therefore, gave the plaintiff the costs of the suit up to the decree, because no account was rendered before the bill was filed, although an account was demanded. But as the taking of the account showed that nothing was due, the plaintiff not having been satisfied with the account rendered by the answer, he gave to the defendant (the executor) his costs of the subsequent proceedings. Now it has been said that the costs which the plaintiff got in that case as against an executor who, being applied to for an account, gave no account until a bill was filed, and then stated an account in his answer to the bill, were paid out of the estate; and were not ordered to be paid by the executor himself. But that must be a mistake, for it would be to say that, not the man who had failed in his duty to the estate, but the estate itself should bear the costs.

In each case of this kind, where the complaint made is that the executor or trustee has neglected his duty or has not performed it, and therefore ought to pay the costs, the circumstances may differ. In all those cases, where the broad fact is that the executor or trustee, who is bound to have his accounts ready, and bound to produce them when asked for, neglects his duty, it would follow that, unless there are some extraordinary circumstances to explain his conduct, he ought to pay the costs. It seems to me that, as to the three cases cited from Mr. Beavan's

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reports, it is unnecessary to say more than that the Court, having had the opportunity of considering how the parties had discharged their duty, did not think fit to visit them with costs. Neither of the two learned Masters of the Rolls intended to overrule anything decided by Lord Eldon, Sir Thomas Plumer, or Sir John Leach. Mr. Lewin, in his book on Trustees, lays down the rule very accurately and clearly, for he says (p. 599), "As an incident to the beneficial enjoyment of his interest by the *cestui que trust*, he has a right to call upon the trustees for accurate information as to the state of the trust." And again, he says: "In a trust for sale for payment of debts, the party entitled, subject to the trust, may say to the trustee—What estates have you sold? what is the amount of the monies raised? what debts have been paid? &c. It is, therefore, the bounden duty of the trustee to keep clear and distinct accounts of the property he administers, and he exposes himself to great risks by the omission. If any particular instance of misconduct or a general dereliction of duty in the trustee, or even his mere caprice and obstinacy, be the immediate cause why the suit was instituted, the trustee, on the charge being substantiated against him, must pay the costs of the proceedings his own improper conduct has occasioned." In the present case, the plaintiff, before the institution of this suit, applied for the accounts and got none. I am clearly of opinion, putting the fairest construction upon the conduct of Dashwood, who seems to have acted honestly as a trustee, and only to have neglected to render accounts when called upon to do so, that neglect was a breach of duty. He was bound to have his accounts ready. Up to the time when the amended bill was filed, the schedules in the answer did not give the information required. Dashwood, therefore, up to the time of the filing of the amended bill, must pay the plaintiff's costs of this suit. As to Randall, there was no application made to him for

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an account. Upon the result, therefore, Randall cannot be charged with costs, nor can he be allowed any. At the hearing, there seemed sufficient ground for the Court to direct that if, in taking the accounts, it should appear that any wilful neglect or default had been committed by the trustees, they should be charged with it in taking the accounts. The accounts have been carefully taken, and no wilful neglect or default has been found; but this result has happened, that, in order to state the accounts accurately, it has been found impossible to adopt implicitly the accounts as stated in the schedule to the answer. I can find no such gross misconduct as would justify the Court in refusing to the trustees the costs of taking this account. What weighs with me is, that Dashwood, the trustee, by an act which has redounded greatly to the benefit of the trust estate, but which, according to the declaration of the trust, was not a strictly proper act, has succeeded in benefiting the estate. That being so, it would be extremely severe to refuse the trustee his costs out of the estate. Upon the whole, therefore, it seems to me that, as to Dashwood, he must pay the costs of the plaintiff up to the filing of the amended bill. No costs can be allowed to Randall up to the filing of the amended bill. Upon all the subsequent proceedings, both Dashwood and Randall are entitled to costs out of the trust estate. Only one set of costs between Dashwood and Randall.

1861.

Jan. 19th.

Where, in a suit to administer an intestate's estate, the whole of the real estate is applied in payment of debts, the heir-at-law is entitled to his costs as between solicitor and client.

TARDREW v. HOWELL.
 PARRY v. HOWELL.

DAVID HOWELL, being indebted to several persons, died intestate, leaving Hannah Howell, his widow, and Thomas Howell, his heir-at-law. Letters of administration were afterwards granted to Hannah Howell.

Samuel Tardrew, a creditor, filed his bill on behalf of himself and all other creditors to administer the estate of the intestate, against the heir-at-law. A second suit was instituted against the trustees of the marriage settlement of the intestate; and a third suit by a creditor named Parry. The suits were consolidated.

By his report, dated 1854, the Master found that the personal estate of the intestate was insufficient to pay the debts and funeral expenses; and an account, therefore, was directed of the rents and profits of the real estate, and the same was directed to be sold, subject to incumbrances, &c.

The chief clerk, by his certificate, dated May, 1858, found that the rents and profits of the real estate had been received by a mortgagee in possession, and that the incumbrances on the estate were as stated in the schedule thereto; and that the real estate had been sold.

The result of the sales and payments of incumbrances out of the proceeds was, that there now remained in court a sum of 5152*l.* 6*s.* Consols to satisfy the various claims upon it, including a balance due to Mrs. Howell, the widow, in respect of payments made by her amounting to 1461*l.* 7*s.* 9*d.* on behalf of the estate; a sum due to her in respect of arrears of an annuity secured to her by her marriage settlement, which in 1858 amounted to 385*l.* 15*s.* 5*d.*; and a sum of 3333*l.* 6*s.* 8*d.* Consols, pro-

posed to be set apart to provide for the widow's life annuity, and also for a sum of 2000*l.* which was under the same settlement payable upon the widow's death to the children of the marriage. It was obvious, therefore, that the real and personal estate were insufficient.

The case now came on for further consideration.

Mr. *White* appeared for the plaintiff.

Mr. *Renshaw* and Mr. *A. C. Miller* appeared for the plaintiff *Parry*.

Mr. *T. H. Terrell* for the trustees of the settlement.

Mr. *Walker* and Mr. *Nalder* for Thomas Howell, the heir-at-law, asked for his costs, as between solicitor and client, on the ground that he was brought before the Court for the benefit of the creditors, as a necessary party, to enable them to deal with the real estate.

Mr. *Craig* and Mr. *Elderton*, for the administrator, contended that, at most, the heir-at-law was entitled to his costs as between party and party: *James v. James* (a); *Whitaker v. Hume* (b).

[*Seton on Decrees*, also, was cited, p. 66.]

THE VICE-CHANCELLOR:—

When the heir-at-law is before the Court in an administration suit, and all the real estate is found to belong to the creditors, he is not here for any benefit to himself, but is only here to have the property taken from him which belongs to other people. He is in the position of a trustee who holds property which is clearly vested in him as heir-at-law, but which belongs to others.

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TARDREW
v.
HOWELL.
PARRY
v.
HOWELL.
Statement.
Argument.

Judgment.

(a) 11 Beav. 397.

(b) 14 Beav. 528.

1861.

TARDREW

v.

HOWELL.

PARRY

v.

HOWELL.

Judgment.

There is no distinction between a trustee and an heir-at-law in a case where the estate belongs wholly to the creditors. Where, however, it is found that part of the estate belongs to the heir, and part to the creditors, he is before the Court in this situation, that he has, by the result of the proceedings, ascertained what he could not otherwise have ascertained, how much belongs to himself and how much to others. That is a benefit to him, and therefore in that case he gets costs only as between party and party.

But in the present case, the creditors having brought the heir here for their own purpose, he is entitled to his costs as between solicitor and client, and any costs, charges, and expenses properly incurred in order to put the creditors in possession of the property which is theirs.

In every case where an heir is dragged into this court with an estate vested in him, before that estate can be taken from him, he is entitled to be indemnified. The order, therefore, will be, that all parties now before the Court are to have their costs up to this time out of the fund; and direct that those of the administratrix and of the heir shall be taxed and paid between solicitor and client, and shall include all costs, charges, and expenses, if any, properly incurred by them with respect to the intestate's estate.

FUTVOYE v. KENNARD.

1861.

Jan. 24th.

THE bill in this case was filed on the 13th of January, 1859, for the purpose, *inter alia*, of enforcing certain agreements as to the construction of the Crystal Palace in Oxford Street. The plaintiff subsequently gave notice of a motion for an injunction, and for the appointment of a receiver in the place of Mr. Wesley who had been appointed under the agreements between the parties. The motion came on to be heard, and was refused with costs, which were subsequently taxed by the defendant at 159*l.* 3*s.* 8*d.*

The plaintiff, having failed to pay the costs at the time fixed, was in contempt. Certain proceedings were then carried on at chambers, answers were filed, exceptions taken, and further answers put in.

The plaintiff then obtained an order to amend, and on the 28th of July filed his amended bill and afterwards fresh interrogatories. Answers were put in to the amended bill, and a replication was filed on the 21st of February, 1860. On the 7th of April plaintiff obtained an order to enlarge the time for closing evidence, a second order to amend on the 7th of May and on the 25th of May, which latter enlarged the time to the 18th of June, 1860. On the 5th of June, 1860, the defendants applied for an order to stay all further proceedings in the cause until the plaintiff had cleared his contempt, and the following order was made:—

“It is ordered that all further proceedings in this cause be stayed until the plaintiff has cleared his contempt in this cause, or given security for costs already incurred and to be incurred, such security to be settled by the judge, in case the parties differ.”

The plaintiff taking no further steps to prosecute

Where a defendant obtained against a plaintiff who was in contempt for non-payment of costs, an order to stay all further proceedings in the cause until the plaintiff had cleared his contempt or given security first, and afterwards moved to dismiss the bill for want of prosecution, the Court refused the motion.

1861.
 PUTVOYE
 v.
 KENNARD.

Argument.

the suit, and having failed to pay the taxed costs or to give security for such costs, the defendant now moved to dismiss the bill for want of prosecution.

Mr. *Malins* and Mr. *H. Stevens* for the defendants.

The time having expired (3rd article of the 33rd order), the defendants were entitled to have the bill dismissed. [The VICE-CHANCELLOR.—The plaintiff is prevented by the defendants' act from further prosecuting the suit.] The order only restrains the plaintiff from proceeding until he has cleared his contempt, and enforces the ordinary rule of the Court, that a party in contempt cannot proceed until he has cleared his contempt.

It was submitted, first, that the order only required the plaintiff to pay the costs before going on; and, secondly, if the order was a prohibition it only enforced the rule of the Court, that prevented a party in contempt from taking any active steps in the cause until he had cleared his contempt.

Mr. *Bacon* and Mr. *Tripp* appeared for the plaintiff, but were not called on.

Judgment.

THE VICE-CHANCELLOR:—

This application is wholly irregular. The defendants have themselves obtained an order, which prevents the plaintiff from doing the very thing which they complain he has not done. How could the plaintiff prosecute the suit after the order of the 5th of June, 1861. It is said that the order is in the alternative, and that by paying the costs ordered to be paid the plaintiff would have been at liberty to proceed with the suit; but here the defendants are insisting on a strict right, and must show they are entitled to do what they seek.

The motion is wholly irregular and must be refused. The costs to be costs in the cause.

CARDINALL v. MOLYNEUX.

THIS bill was filed on the 31st of March, 1859, by George Cardinall, on behalf of himself, and all other the parishioners of the parish of St. Gregory, Sudbury, against the Rev. John H. Molyneux, the perpetual curate of the parish, George Grimwood, a builder, and W. R. Rolfe, an auctioneer, and it prayed—

“ 1. That the defendants, their agents and workmen, may be restrained from further destroying, cutting down, severing or removing the pews and sittings, or the gallery of the church, or any of the other internal fixtures and fittings of the church, or such ends or panelled work forming pews, sittings, gallery fixtures, and fittings, respectively.

“ 2. That the defendant Rolfe may be restrained from selling or offering for sale, any of the building materials or panelled work mentioned in the advertisement, or the pews, fittings, gallery, &c. &c.

“ 3. That, if necessary, the rights and interests of the parishioners, and of the said J. H. Molyneux, respectively, in the said materials and panelled work may be declared,” &c.

The bill stated that the plaintiff was one of the churchwardens, and the defendant J. H. Molyneux, the perpetual curate of the parish.

The material allegations in the bill were as follows:—

“ 4. The parish church of Saint Gregory was open and used for the purposes of public divine worship until within about nine months last past, when the defendant J. W. H. Molyneux caused the same to be closed for the purpose of effecting certain repairs of or to the roof of the same, or some other repairs, but he so closed the

1859,
May 12th.

1861,
March 13th.

Injunction granted on a bill by a churchwarden, on behalf of himself, and the parishioners to restrain the incumbent, and his agents, from dismantling the church and selling the pews, &c., with a view to improve the building, the incumbent having obtained no faculty. The Court ordered that the plaintiff and defendants be at liberty to lay before the judge in chambers proposals for fitting up the interior of the church, such proposals to be subject to the approbation of the bishop; and, on the chief clerk's certificate of plan approved by the bishop of the diocese, the Court ordered the adoption of that plan.

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—
Statement.

same, and caused such repairs to be commenced, without the consent of the plaintiff, and without the consent of the parishioners of the said parish, and without the authority or consent of the bishop of the diocese. Nevertheless, the surveyor of the bishop has since reported certain repairs of the roof of the church to be necessary or proper, and so far as such repairs of the roof are concerned, it may be considered that the defendant J. W. H. Molyneux, in repairing the same roof and closing the church for the purpose of such repair, is not acting without the authority of the bishop of the diocese, so far as such authority may be available in support of such proceedings.

“ 5. There were in the said church, previously to the 30th day of March instant, a large number of fixed pews and sittings, and a large and commodious gallery at the west end of the said church.

“ 6. The defendant J. W. H. Molyneux, on the morning of the 30th of March instant, or possibly and at the earliest on the day next previous thereto, caused the aforesaid pews and sittings in the said church, or the greater portion of them, and the gallery of the said church to be cut down, severed, and removed, with the view and intention of carrying away the same, or the materials of which the same are formed; and the whole interior of the said church has been or will be thereby despoiled and wasted.”

The builder employed in the removal of the fittings was the defendant Grimwood. The bill alleged that defendant J. W. H. Molyneux caused the sittings and the gallery to be destroyed, without the consent of the plaintiff, or of the aforesaid churchwarden.

On the 30th of March, 1859, the defendant Rolfe, by the direction of Molyneux, issued the following advertisement:—

“ Sudbury Market.

“ To Carpenters, Builders, and the Public.

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“ To be sold by auction, by Mr. W. R. Rolfe, on the Market Hill, on Thursday next, at two o'clock in the afternoon, a quantity of capital building materials, consisting of doors, door-frames, glazed and unglazed sashes, sash-frames, casements, two frontispieces, with pilasters, &c., complete, three staircases with rails, register and other stoves, iron and wood chimney-pieces, 120 feet 2-inch iron bars, ten rick-stoves, &c. &c.; together with (arising from the repairs, &c., at the church of St. Gregory), about 4000 feet panelled work, 2000 ditto floor-boards, benches, joists, &c. &c. Further particulars on application to the auctioneer, opposite the Town Hall, Sudbury.”

This advertisement was published in the “ Suffolk and Essex Free Press,” published at Sudbury. The bill alleged that it was the intention of the defendant Rolfe to sell the materials in pursuance of the advertisement, and that such sale was not authorized by the parishioners, nor had any licence been obtained for effecting such sale.

Early in the morning of the 31st of March, the plaintiff, as one of the churchwardens, with other persons, attempted to stop the removal of the materials, but without success. He thereon gave the defendant the following notice:—

“ To the Rev. John William Henry Molyneux, perpetual curate of the parish of St. Gregory, Sudbury, in the county of Suffolk. To William Rowland Rolfe, of Sudbury, aforesaid, auctioneer, and to George Grimwood, of Sudbury, aforesaid, builder, and to each and every of them. I, the undersigned, George Cardinall, churchwarden of the parish of St. Gregory, Sudbury, aforesaid, do hereby give you and each and every of you

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notice not to pull down, remove, sell, or dispose of the pews and sittings or the materials thereof, in the parish church of St. Gregory in Sudbury, aforesaid, and that it is my intention forthwith to apply to the High Court of Chancery, for an injunction to restrain you and each and every of you from pulling down, removing, selling, or disposing of the said pews or the materials thereof, or otherwise, as I may be advised. Dated this 30th of March, 1859."

The bill charged that the sale, even if made with proper authority, was without sufficient notice, &c., and not made with a due regard to the interests of the parish.

On the 31st of March, an injunction restraining the sale was granted by Vice-Chancellor Stuart; and in the afternoon of that day a telegraphic despatch, containing notice of the order, was served upon Mr. Rolfe at the Market Hill, Sudbury, at half-past four o'clock, whilst he was in the act of selling lot 84. The plaintiff's evidence went to show that Mr. Rolfe, notwithstanding the notice, went on with the sale for about half an hour afterwards; that George Grimwood was standing by; that he knew of the contents of the despatch, but nevertheless assisted to continue the sale. On the other hand, Mr. Grimwood denied that he knew of any telegraphic message whatever having been sent till seven o'clock in the evening. Mr. Rolfe said he did not believe that lot 84 contained timber from the church. He denied that he knew the contents of the paper till he had sold lot 84, and alleged that none of the other lots, which were ten in number, contained any materials from the church. Notice of the injunction was duly served on all the defendants in the course of the evening, but there was some conflict in the evidence as to the time of service. Mr. Drew, the clerk, whose evidence was confirmed by Mr. Gooday, the plaintiff's solicitor, said he served it on George Grimwood at a quarter past five,

on Mr. Molyneux at about twenty minutes to six, and on Mr. Rolfe about eight o'clock. Mr. Grimwood deposed that no notice was served on him until at least half-past six. Notice of motion on the 4th of April ensuing, to commit the defendants Grimwood and Rolfe for contempt, was served on them the same evening.

On or about the 4th of April, 1859, the plaintiff George Cardinall filed a supplemental bill on behalf of himself and all the parishioners of St. George's, Sudbury, against the Rev. Mr. Molyneux and George Grimwood, alleging that, notwithstanding the order of the 31st of March, the defendant J. W. H. Molyneux, having removed the pews and sittings in the said church, was now taking or pulling up the floor of the said church, and placing brickwork there, with the intention of raising portions of the floor and substituting chairs and benches for pews; and he was, in fact, so altering the floor of the said church, and the materials of which the same is formed, as to render the same unsuitable for pews, and so as to involve considerable expense in the restoration of the floor to its former state, and in the replacing of the pews. That he was about to remove the window at the west end of the church, and about to place a new window in lieu of the same, and to make a new entrance to the church at the west end, and to remove a large quantity of brickwork for the purpose of making such new entrance. That he was also causing a hole to be cut in the brickwork of the outer wall on the south side of the church for the purpose of effecting some alteration in the church, the precise nature of which the plaintiff does not know and is unable to state. That he was, in fact, altering generally the internal arrangement and structure of the said church. That the person employed by such defendant in effecting the aforesaid alterations of and in the said church was the defendant George Grimwood, and the said last-named defendant and his workmen have been and are in fact

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executing the works hereinbefore mentioned under the direction of the defendant J. W. H. Molyneux. That the defendant J. W. H. Molyneux was causing the said alterations to be made without the consent of the plaintiff, as one of the churchwardens of the said parish, and without the consent of the parishioners of the said parish, or of the bishop of the diocese, and without any licence or faculty in that behalf, and that this want of authority was known to the defendant George Grimwood; and in fact the said alterations, or intended alterations, were disapproved of by the parishioners of the said parish. That, notwithstanding the order made against the defendants as aforesaid, the said W. R. Rolfe, under the direction of the defendants, sold the said materials and panelled work in the said original bill mentioned, by public auction, on the afternoon of the 31st of March last, and with the privity of the said defendants hereto all the said materials and panelled work, or the respective lots of the same so put up for sale as aforesaid, were delivered to the purchasers at the said auction, and were removed and carried away. That the said materials and panelled work were of great value, and the removal and sale of the same have caused great loss to the said parish and the parishioners.

The bill prayed, that the defendants Molyneux and Grimwood, and their agents, servants, and workmen, might be restrained from altering the floor of the said church, or altering the walls or brickwork of the said church, or executing any works affecting the floor, walls, or brickwork of the said church, or the internal arrangement of the said church, or any of the panelled work, &c. That the defendants might be decreed to pay to the parishioners or the churchwardens of the said parish, on account of the parishioners, the value (to be ascertained in such manner as this Honourable Court shall think fit) of the said pews, &c. &c., so destroyed or

so removed as aforesaid, and of all other materials belonging to the said church which had been destroyed or removed by or under the direction of the defendants, or either of them; and might replace, or restore, or pay the costs and charges of replacing and restoring the said pews, sittings, gallery fixtures, fittings, materials, and effects.

On the 20th of April an interim order was made, restraining Messrs. Molyneux and Grimwood, and a motion was also made to commit the defendants Rolfe and Grimwood for contempt; both motions ultimately stood over until the 12th of May, when the Court made an order for the injunction, and ordered that the plaintiffs and defendants should be at liberty to lay the proposal before the judge in chambers for fitting up the church(a), and acquitted Rolfe and Greenwood of any intention to disobey the orders; but directed them to pay 15*l.* each towards the costs of the motion.

(a) The order was as follows: — "That an injunction be awarded to restrain the Rev. J. W. H. Molyneux and George Grimwood, and their agents, &c., from taking up or altering, or causing to be taken up or altered, the floor of the parish church of St. Gregory, in Sudbury, in the county of Suffolk, in the plaintiff's supplemental bill mentioned; or altering, or causing to be altered, any of the walls or brickwork of and in the said church; or executing, or causing to be executed, any work or alterations affecting the floor, walls, or brickwork of the said church, or affecting the internal arrangements or structure of the said church, or any of the panelled work, fixtures, or fittings pertaining thereto, until the hear-

ing of this cause, or until the further order of this Court: and it is ordered, that the plaintiffs and defendants, and any of the churchwardens of the parish of St. Gregory, Sudbury, in the county of Suffolk, be at liberty to lay before the judge to whose court this cause is attached proposals for fitting up the interior of the parish church of St. Gregory aforesaid, and providing proper accommodation therein for the minister and parishioners of the said parish for the performance of divine service; but such proposals are to be subject to the approbation of the bishop and archdeacon of the diocese of Ely; and any of the parties are to be at liberty to apply as they may be advised."

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In pursuance of the above order, the plaintiffs and defendants both brought in proposals, which differed on several points, but particularly on the question of pews. The plaintiff proposed that the pews which had been removed should be replaced. The defendants proposed to fix benches for seating the congregation, as far as the present seating by chairs and benches was insufficient. As to the gallery at the west end of the church, the plaintiff also proposed that it should be replaced on a plan to be approved by the bishop, and the organ restored therein. The defendants proposed to erect the organ at the east end of the north aisle, and to open and glaze the west window, which was partially bricked up. These proposals were laid before the bishop, who made several observations thereon; and among others, that he had the strongest objection to chairs. He did not object to a gallery with an organ therein, but not having a plan of the church before him, he could form no opinion whether it should be on the old site. He repeatedly and strongly urged that nothing should be carried into effect without a faculty. Further replies were sent by the plaintiff, and observations returned by the bishop, and the whole of the documents were laid before the chief clerk. The matter stood over for a time to enable Mr. Molyneux to apply for a faculty.

In May, 1860, the defendant Mr. Molyneux and James Hassell, churchwardens, presented a petition to the chancellor of the diocese of Ely, praying for a faculty to perform the works set forth in the petition; and a citation was issued under the seal of the chancellor of the diocese. It recited the petition, alleging that the following further works were required to complete the restoration of the church: the floor of the church to be completed, the pulpit to be re-erected in its former position, and the sounding-board to be removed; a new reading-desk to be

erected; the font to be placed at the north-west end of the nave; the organ to be placed at the east end of the north aisle. In addition to the present accommodation, which consisted of chairs, to complete the seating of the church with benches similar to the best of those now in the church, the bricks which at present block up part of the west window to be removed, and glass substituted, and the windows of the church generally repaired, and where necessary re-glazed, and the walls repaired. The petition alleged, further, that a meeting of the incumbent, churchwardens, parishioners, and inhabitants of the parish was held in the vestry on the 10th of May, 1860, at which the said proposed works were approved; and that the cost, estimated at 270*l.*, was intended to be raised, and was for the most part already raised, by voluntary subscription, without a church-rate. The citation then recited the prayer for a faculty, and cited the parishioners to appear and show cause against the faculty before the surrogate at St. Mary's Church, Cambridge, on the 26th of May.

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Attempts were made to agree on the plan, but in vain; and on the 9th of June the plaintiff's solicitor and Mr. Molyneux were heard, when the Court refused to grant a faculty, as the plaintiff's solicitor alleged, on the ground that defendant's plan was not in conformity with the suggestions of the bishop.

On the 3rd of December, 1860, the chief clerk made his certificate, dated the 3rd, whereby he certified that, in pursuance of the order of the 12th of May, 1859, the plaintiff and the defendant Mr. Molyneux had each laid before the judge proposals for fitting up the interior of the church and providing better accommodation, &c.; and that it would be fit and proper that such interior should be fitted up, and such accommodation provided according to the plan thereto annexed; which plan had

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been approved of by the bishop and archdeacon of the diocese of Ely, as was admitted by the plaintiff and defendants. The plan was as follows:—

1. The church to be properly floored and fitted up with single pews, according to the plan of pews in modern churches, or with open benches. The question of the general style and character of the pews or benches to be settled in the proceedings requisite for obtaining a faculty.

2. The font to be placed at the west end of the church.

3. The pulpit to be lowered, and a new reading-desk erected, as shown on plan; and the sounding-board to be removed. The pulpit and reading-desk to be in character with the general fittings of the church.

4. The organ to be placed as shown on the plan (*i.e.*, between the north aisle and the chancel).

5. The west window of the church to be opened, and properly glazed.

On the 10th of December, 1860, the Vice-Chancellor confirmed the certificate.

Argument.
 —

Mr. Bacon and Mr. T. H. Terrell now moved for a perpetual injunction against Mr. Molyneux and G. Grimwood, as prayed by the bill.

Mr. Malins and Mr. Surrage, for the defendants

Judgment.
 —

THE VICE-CHANCELLOR:—

The circumstances of this case are unusual. But the plaintiffs are entitled to maintain such a suit. The churchwardens are by law the guardians and keepers of the church, and representatives of the body of the parish. Although the rector or vicar is in every case seised of the body of the church itself, it seems clearly established that what relates to the pews and ordering of

the interior of the church for the accommodation of the parishioners appertains to the churchwardens, to whom the authority of the ordinary is in this case delegated.

There must be one order in both suits, and a decree for a perpetual injunction on the terms of the notice of motion. There must also be an order that the defendants take and concur in all proceedings necessary to obtain a faculty for repairing and restoring the church according to the scheme approved of in the certificate; with liberty to apply (*a*).

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—
Judgment.

ELWES v. ELWES.

CARY CHARLES ELWES filed this bill for the rectification of a marriage settlement on the ground of mistake. The settlement which was embodied in two indentures of lease and release, dated the 16th and 17th of August, 1826, was between R. C. Elwes (the plaintiff's father, of the first part); the plaintiff, of the second part; E. Rye, the intended wife, of the third part; and certain trustees, of the fourth, fifth, sixth, and seventh parts. By the settlement, certain hereditaments in Lincolnshire were made, subject to two terms; one for securing to the plaintiff, during the joint lives of himself and his father, a rentcharge of 2000*l.* a year, the other to secure a jointure of 800*l.* a year to the intended wife. The said hereditaments were then limited to the indenture therein named, to the use of Robert C. Elwes for life, remainder to the use of plaintiff for life, remainder to the use of trustees to support contingent remainders, remainder to

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Nov. 13th,
15th, 16th,
& 19th.
1861,
Jan. 22nd.
The principle on which the Court reforms a settlement, is to make it conform to what was the real agreement. But the Court will not interfere to alter or reform a settlement on the ground that a stipulation or limitation which was wished for, and intended by one of the contracting parties, but never agreed to or mentioned to the other, has been omitted from the settlement.

(*a*) See Stephen's Commentaries, vol. 3, cap. 3, p. 68.

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the use of trustees for the term of 2000 years, upon trusts for securing the sum of 20,000*l.* for the portions of younger children, remainder to the use of the first and other sons of the plaintiff by his then intended wife in tail male, remainder to the use of the plaintiff and the heirs of his body, remainder to the use of Robert C. Elwes, his heirs and assigns for ever.

In April, 1842, the plaintiff applied to his father, R. C. Elwes, for pecuniary assistance. R. C. Elwes was desirous that the estates should descend in the male line to the exclusion of the female line, and he offered to assist the plaintiff upon certain terms which included an increased provision for the plaintiff's daughters; and after some negotiation it was agreed that Robert C. Elwes should make the advance to the plaintiff he required, and that in consideration thereof his annuity of 2000*l.* should be assigned, and his life-estate in remainder demised to trustees upon the trusts for the benefit of his family thereafter mentioned; and further that the plaintiff should bar the estate in remainder limited to him and the heirs general of his body, and settle the property to the uses thereafter mentioned.

At the date of this agreement, the plaintiff had one son, the defendant Valentine Dudley Henry Cary Elwes, called hereafter for brevity's sake Valentine Elwes, and three daughters, E. C. A. Elwes, S. D. Elwes, and M. S. Elwes.

Robert C. Elwes had then living his eldest son (the plaintiff) and seven younger sons.

In pursuance of the said agreement, by an indenture or disentailing deed, dated the 23rd of April, 1842, between the plaintiff, of the first part; R. C. Elwes, of the second part; and one Raymond, of the third part, all the manors and hereditaments comprised in the settlement of 1826 were granted and confirmed unto the said Raymond, to hold the same, subject to the uses of the

deeds of 1826, and to the power of jointuring; and in further pursuance of the said agreement, by an indenture, dated the 25th of April, 1842, between the plaintiff, R. C. Elwes, and certain trustees, it was declared that the trustees therein named should stand possessed of a sum of 15,000*l.*, advanced to them by Robert C. Elwes, upon the trusts therein mentioned, being trusts to relieve the plaintiff from his pecuniary embarrassments; and it was further witnessed that in consideration of the said advance of 15,000*l.*, and for other good causes, the plaintiff granted the annuity of 2000*l.* to trustees upon trust to keep down an annuity of 440*l.*, and the interest on a debt of 2270*l.*, as thereby declared, and subject thereto, upon trusts, for the benefit of the plaintiff, and Elinor, his wife, and their children; and it was further witnessed, with the consent of Robert C. Elwes, and subject and without prejudice to the powers and privileges thereafter saved and confirmed, the plaintiff granted and demised the said manors and hereditaments comprised in the said settlement of 1826, to which he was entitled for life, in remainder expectant on the decease of Robert C. Elwes (subject to the life-estate of Robert C. Elwes, and to the powers thereby limited) to trustees, their executors, administrators and assigns, for the term of ninety-nine years from the decease of Robert C. Elwes, if the plaintiff should so long live, on trusts for securing the application of the rents, issues and profits of the said manors and hereditaments, for the benefit of the plaintiff, and Elinor, his wife, and their children. And the plaintiff thereby granted unto and to the use of trustees, and their heirs, all and every the manors and hereditaments comprised in the indentures of the 16th and 17th of August, 1826, subject as aforesaid, to all the estates prior to his own estate in tail general, to such uses and subject to such powers and limitations as Robert C. Elwes, and the

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plaintiff should, during their joint lives, appoint; and in default thereof, and subject thereto, to the defendant Valentine Elwes, and the heirs of his body; remainder to the use of the second and every other son of the plaintiff, and Elinor, his wife, successively in tail male, remainder to Eleanora C. Elwes, the eldest daughter of the plaintiff in tail, remainder to Sophia D. Elwes, the second daughter of the plaintiff in tail, remainder to Marian G. Elwes, the third daughter of the plaintiff in tail, remainder to the fourth and every other younger daughter of the plaintiff, by Elinor, his wife, in tail, remainder to the daughter of the plaintiff by a second wife in tail, and in default of such issue as Robert Cary Elwes should by deed or will appoint, and in default of appointment, to Dudley Christopher C. Elwes (since deceased) in tail male, remainder to the defendant George Cary Elwes, in tail male, with remainder over to the other sons of R. C. Elwes, successively.

The bill alleged that the value of the said manors exceeded 10,000*l.* per annum, that the said R. C. Elwes was anxious to keep the estate in the male line, and that the defendant Valentine Elwes was a delicate child, of thirteen years of age, and that, having regard to these circumstances, the plaintiff agreed with his father, to resettle the estates in the male line, provided that they were charged with 100,000*l.* for the benefit of the plaintiff's daughters; and, as the bill alleged, the plaintiff would not have agreed to resettle the estate on any other terms.

In pursuance of this agreement, by an indenture, dated the 16th of March, 1846, indorsed on the indenture of the 25th of April, 1842, Robert C. Elwes, and the plaintiff, in exercise of their general power of appointment, reserved by the said indenture, directed and appointed that the hereditaments should from thenceforth enure (subject and without prejudice to the estates by the indenture of the 17th of August, 1826, limited prior to

the plaintiff's estate in tail general) to such uses as Robert Cary Elwes and the plaintiff should, during their joint lives, appoint, and in default of appointment, to the use of the Earl of Yarborough and Thomas Barnard, their executors, administrators and assigns, for the term of 1500 years from the decease of the survivor of Robert C. Elwes and the plaintiff, and the failure or determination of the limitations contained in the settlement of 1826, to the use of the first and other sons of the plaintiff, by his then or future wife, successively, in tail male, without impeachment of waste; nevertheless, upon and for the trusts, and subject to the proviso thereafter expressed, upon the trusts thereafter expressed; and as to the said manors and hereditaments, subject to the said terms, to such uses as Robert C. Elwes by deed or will should appoint, and in default of such appointment, to Dudley Christopher C. Elwes in tail male, with remainder to the defendant George C. Elwes, in tail male, with remainders over; and as to the said term of 1500 years, it was thereby declared that the same was so limited upon trust, that if the defendant Valentine Elwes, the then present and still only son of the plaintiff, and all and every other the son and sons of the plaintiff, should die without issue male, the trustees or the survivor of them, or the executors, administrators, or assigns of such survivor, should, after the decease of the survivor of Robert C. Elwes and the plaintiff, and such failure of issue male of the plaintiff as aforesaid, raise 100,000*l.* for the portions of Eleanora Elwes, Sophia Elwes, and Marian Elwes, the then present (and still the only) daughters of the plaintiff, by Elinor, his wife, and of all other daughter and daughters of the plaintiff, in addition to the portions already provided for his younger children, the sum of 100,000*l.*, to be paid and divided among such daughters as the plaintiff by deed or will should appoint, and for want of appointment amongst them in equal shares.

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At the time of the execution of the last-mentioned indenture, Robert Cary Elwes, being then seised in fee of a family mansion and hereditaments called Billing Hall, in Northamptonshire, in consequence of the plaintiff having concurred in executing the deed of the 16th of March, 1846, altered the dispositions which he had made in his will concerning the mansion-house and other Northamptonshire estates; and by a codicil devised the same to the uses and subject to the trusts of the said deed. Robert C. Elwes and the plaintiff never exercised the joint power of appointment reserved to them by the deed; Robert C. L. Elwes died in February, 1852.

By the marriage settlement, dated the 13th of March, 1848, of Charles Fitzgerald and Eleanora C. A. Fitzgerald, then Elwes, his wife, one-third of the said sum of 20,000*l.*, secured by the term of 2000 years in the indenture of the 17th of August, 1826, and any further share to which he was entitled by survivorship were settled on the trusts therein mentioned. And it was thereby further agreed and declared that if the said Eleanora Elwes, or the said Charles Fitzgerald in her right, should at any time during their joint lives become entitled to any part or share of the said sum of 100,000*l.* provided to be raised for the further or additional portions for the daughters of the plaintiff under the trusts of the indenture of the 16th of March, 1846, then all such further portion or portions should be settled upon the like trusts.

In the latter part of the year 1855, the bill alleged that Valentine Elwes, being desirous of marrying Miss Lane, and of varying the limitations and estates comprised in the indentures of the 25th of April, 1842, and the 16th of March, 1846, in order to obtain an adequate income, applied to the plaintiff for assistance. The plaintiff, under these circumstances, consented to concur with Valentine Elwes in resettling the estates; and it was

agreed between them, as the bill alleged, that, subject to plaintiff's life estate and other limitations preceding the estate in tail male in remainder, and all powers thereto annexed, &c., and subject to all subsisting charges, the property should be settled to the use of Valentine Elwes for life, remainder to his first and other sons in tail male, with powers of jointuring and charging portions for younger children; and that the plaintiff should secure to Valentine Elwes 1200*l.* per annum; and that power should be given to the plaintiff to charge the estates with any sum not exceeding 20,000*l.* for his own benefit, out of which Valentine Elwes was to receive 1000*l.* to start with, and to have his debts paid.

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The 20th paragraph of the bill alleged, that of the younger brothers the eldest was dead, leaving D. G. C. Elwes his heir; that it was further agreed between the plaintiff and Valentine Elwes, that in substitution for the estates tail male by the indenture of the 16th of March, 1846, limited to the plaintiff's younger brothers in remainder after and subject to the term of 1500 years, and the trusts thereof for the benefit of the plaintiff's three and other daughters, if any, the defendant D. G. C. Elwes should become tenant for life, with remainder to his issue male, with remainder to G. C. Elwes and each of the surviving younger brothers of the plaintiff successively for life, remainder to the issue male, &c. But it was not agreed or intended that, save for the benefit of the plaintiff, the defendant Valentine Elwes, and his wife and issue, the plaintiff's daughters should be prejudiced, and that the term of 1500 years, or the trusts thereof, should be omitted from the resettlement, but that the said term and the trusts thereof for the plaintiff's daughters should be left wholly unaffected.

The only parties to the agreement to resettle the estates were the plaintiff and the defendant Valentine Elwes.

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One of the provisions of the signed proposals was as follows:—"Mr. Valentine Elwes to disentail the reversion of the above estates, and limit them in remainder, from and after the decease of Mr. Cary Charles Elwes, and subject to his life interest and powers and to the exercise thereof, and all subsisting charges, to the joint appointment of the father and son, and subject thereto to the previous use—under which power Mr. Cary Charles Elwes and Mr. Valentine Elwes are to concur in appointing the whole of the above estates in remainder; and subject as aforesaid to the uses following, namely, to the use of Mr. Valentine Elwes for life, *sans* waste, remainder to the trustees to preserve contingent remainders, remainder to the first and other sons of Mr. Valentine Elwes successively in tail male, remainder to Dudley, the grandson, and all the living younger sons of the late Robert Cary Elwes, Esq., successively for life, *sans* waste, and to trustees during each of their lives, in trust to support contingent remainders, and on the decease of each to his first and other sons successively in tail male, remainder to Mr. Cary Charles Elwes in fee."

In pursuance of the agreement, by a disentailing deed, dated the 3rd of April, 1856, and made between the defendant Valentine Elwes of the first part, the plaintiff of the second part, and the defendant George C. Elwes and Charles James Barnard of the third part, the estate tail was barred; and by another indenture, dated the 5th of April, 1856, and made between the same parties as those last mentioned, after reciting that the defendant Valentine Elwes attained the age of twenty-one years on the 26th of November, 1853, and "that the plaintiff and the defendant Valentine Elwes had mutually agreed that all the said settled estates and hereditaments, stocks, reserved fund and premises comprised in and disentailed by the said indenture of the 3rd of April should be re-settled in remainder or reversion, and subject as in such

indenture and thereinbefore expressed or referred to, upon and for the uses and trusts, and subject to the powers, provisoes, and agreements thereafter expressed of and concerning the same respectively, and in particular subject to such power for the plaintiff to charge the same estates with the sum of 20,000*l.* sterling and interest for his own benefit as was thereafter contained, and that for making an immediate provision for the defendant Valentine Elwes, and in consideration of his concurrence in such resettlement as aforesaid, the plaintiff had agreed to secure by his personal covenant the payment to the defendant Valentine Elwes from thenceforth during the joint lives of himself and the plaintiff a clear annuity of 1200*l.* sterling, payable as thereafter expressed;" the plaintiff and the defendant Valentine Elwes thereby limited and appointed the said manors and hereditaments comprised in the indentures of the 16th and 17th of August, 1826, and in the codicil of the said Robert C. Elwes (after the decease of the plaintiff, and subject to his life estate) to the defendant Valentine Elwes for life without impeachment of waste, remainder to his first and every other son in tail male, remainder to all and every the son and sons of the plaintiff in tail male, remainder to the defendant Dudley George Cary Elwes, the only son of Dudley Christopher C. Elwes, then deceased, for life, without impeachment of waste, remainder to the first and other sons of Dudley George C. Elwes successively in tail male, remainder to the defendant George C. Elwes for life, without impeachment of waste, remainder to the first and other sons of the said George C. Elwes successively in tail male, with remainders over. In the indenture was contained a power for the plaintiff at any time thereafter by deed or will to charge the premises with the payment of any sum not exceeding 20,000*l.* for the use of the plaintiff or for any other use or purpose; also a power for the defendant Valentine Elwes at any

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time thereafter by deed or will to limit or appoint by way of jointure any sum not exceeding the yearly sum of 1200*l.*; also a power for the defendant Valentine Elwes by deed or will to charge all or any of the said hereditaments and premises with the payment of any sum for the portions of younger children not exceeding 20,000*l.*; and a covenant by the plaintiff for payment by him to the defendant Valentine Elwes, during their joint lives, of the yearly sum of 1200*l.*

The bill alleged (paragraph 25) that by the said indentures it was not intended to prejudice the interests of the plaintiff's daughters, but that it was intended by both the plaintiff and Valentine Elwes that the settlement of the 5th of April, 1856, should contain the term of 1500 years in remainder expectant on the failure of issue male; and that both the plaintiff and Valentine Elwes believed such term was contained therein, and the omission was contrary to the agreement.

By an indenture, dated the 15th of July, 1857, on the marriage of Marian Elwes with Mr. Browning, her interest in the said term and the 100,000*l.* to be raised thereby, was, with other property, settled in the usual way.

The alleged mistake was discovered in July, 1857, on the marriage of Mr. Browning.

There was a great amount of evidence produced, consisting chiefly of letters relative to the resettlement of the estates.

Argument
 —

Sir *H. Cairns*, Mr. *G. L. Russell*, and Mr. *Bushby*, for the plaintiff.

The jurisdiction of this Court to relieve in case of mistake was undoubted; that the destruction of this charge was by inadvertence, was equally clear.

The only object of the deed of 1856 was to make provision for the plaintiff and his children. The only parties to the deed were the plaintiff and the defendant Valentine; but the effect of the only part of the deed against which

it was sought to be relieved, was to give a benefit to the remaindermen, who were volunteers, and not the contracting parties.

It was impossible not to see that the destruction of the charge, for which the plaintiff so anxiously bargained by the former settlement, would not have been consented to unless it was absolutely necessary to effect the immediate purpose intended; but it was plain that the charge was not in the way of the proposed resettlement, but quite consistent with it.

But, besides this probable evidence, there was the clear and distinct statement in the proposals that the proposed settlement must be made subject to subsisting charges. On these grounds, it was submitted that the plaintiff was entitled to the relief asked.

Mr. Bacon and Mr. Bristowe, for Valentine Elwes.

Mr. Malins and Mr. Cracknall, for the other defendants.

The error, if error there was, lay in the settlement of 1826, which gave the plaintiff an estate tail general.

The object of the deed of 1842 was to preserve the estate from the plaintiff's creditors. When Valentine Elwes attained twenty-one he might have enlarged the estate into a base fee or a fee simple; and the intention was to resettle the estate subject to subsisting charges, *i.e.*, to charges prior to the estate tail, and not behind them. If what was contended for by the plaintiff was really the intention, Valentine Elwes ought not to have been allowed to consent to such an arrangement, more especially as his sisters had reasonable portions secured to them.

At all events, it was for the plaintiff to prove that there had been a mistake, and not for the defendants to prove the negative. It was clear from the authorities, that, without the clearest evidence of mistake, this Court

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will not relieve. In *Henkle v. The Royal Exchange Assurance Company* (a), a bill to rectify a settlement was dismissed, on the ground that the evidence failed to show that the settlement was contrary to the agreement. In *The Marquis of Breadalbane v. The Marquis of Chandos* (b), the Court refused to alter the settlement, though differing from the proposals, on the ground that there was no evidence to show that these proposals were the final agreement. In *Rooke v. Lord Kensington* (c), it was held that, in order to enable the Court of Chancery to rectify a settlement, it must be proved that it was drawn in its existing form by a mistake common to all the parties. If the evidence be such as to make it doubtful whether this was so or not, the utmost that the Court will do is to direct further inquiry. Again, in *Fowler v. Fowler* (d), it was held, that for the purpose of reforming an instrument, clear and unambiguous evidence must be produced, not merely showing a mistake, but showing the deed in its proposed state to be in conformity with the intention of all the parties at the very time of its execution; and a denial by one of the parties that the deed as it stands was not according to his intention at the time, ought to have considerable weight. It was submitted, therefore, that this bill must be dismissed with costs.

[*Beaumont v. Bramley* (e) was also cited.]

Sir *H. Cairns*, in reply.

The case may be regarded in three points of view:—
 First, as to the probabilities arising from the antecedent circumstances.

Secondly, as to the end and purpose of the settlement of 1856.

(a) 1 Ves. sen. 318.

(b) 2 M. & C. 711.

(c) 2 K. & J. 753.

(d) 4 De G. & J. 250.

(e) T. & R. 41.

Thirdly, with reference to the documentary contemporaneous evidence.

In all and each of these points of view the case of the plaintiff was established, and none of the cases cited had any application here.

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THE VICE-CHANCELLOR:—

The object of this suit is to rectify an alleged mistake in a settlement of family estates, made in April, 1856.

This mistake is said to consist in the destruction of a charge of 100,000*l.* for portions for the plaintiff's daughters, secured by a term of 1500 years, created by a previous settlement made in the year 1846. It is asserted by the plaintiff that this destruction was not contemplated or intended, but has occurred through inadvertence, and by a mistake which ought to be rectified by this Court.

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The charge which has been destroyed was created in 1846, under very remarkable circumstances. So large a sum as 100,000*l.* was nearly one-third of the estimated value of the fee simple of the estates; but the provision for portions to this large amount was carefully bargained for by the plaintiff as a compensation to his daughters for his consenting to exclude them from their right of succession to the estates under a limitation to the plaintiff in tail general in a settlement of 1826. It may, therefore, be fairly considered that the plaintiff would not readily consent to deprive his daughters of a benefit in the way of compensation, for which he carefully and anxiously bargained in the year 1846.

But it is important to notice that this charge, as bargained for by the plaintiff, did not, and could not, in any way affect a prior limitation in the settlement of 1826 to the defendant Valentine Elwes, the only son of the plaintiff, as tenant in tail male. The charge in question was necessarily subject to this previous limitation to the defendant Valentine Elwes in tail male, and therefore it

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was in his power to destroy it on his coming of age, and coming into possession.

In the year 1856, when the defendant Valentine Elwes had attained his age of twenty-one, and was about to marry, his only interest in the estate was his estate in tail male in remainder after the life estate of the plaintiff, his father, who was then tenant for life in possession. Therefore, the arrangement effected by the settlement of 1856, which the plaintiff now seeks to rectify, was natural and proper. It was an arrangement which could only be effected by their concurring to bar the estate tail and resettle.

Agreeing to bar the estate in tail male of Valentine Elwes was, in effect, agreeing to destroy the charge of the 100,000*l.* and the term of 1500 years limited to secure it. And there is this incurable defect in the plaintiff's case, that there is no evidence of any stipulation, or agreement, or proposal made to the defendant Valentine Elwes that this settlement of 1856 should keep alive the charge which the disentailing deed destroyed.

In the preparation of this settlement of 1856 everything was done deliberately and with proper advice. The Rev. Charles James Barnard took an active part in the negotiation. He is a near connection of the family, a man of intelligence, who enjoyed the full confidence of both parties. He is the principal witness for the plaintiff. From the beginning to the end of the negotiations, no mention seems to have been made of the 100,000*l.* or of the term of 1500 years. There was a clear agreement for disentailing the estates and for a resettlement, every point of which seems to have been particularly discussed. It was on the suggestion of this witness—a suggestion first made to Mr. Rackham, the solicitor, by a letter dated December 31st, 1855—that a power was agreed to be given to the defendant Valentine Elwes to charge a jointure for his wife and portions for his younger children to the

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extent of 20,000*l*. At the meeting of the 18th of January, 1856, after several previous letters, the whole scheme of resettlement was discussed at the chambers of the solicitor. Proposals in writing were prepared, which contained all the points agreed upon and a full statement of all the limitations and powers. No mention whatever occurs in these written proposals of any intention to keep alive the term of 1500 years and the charge of 100,000*l*. Again, on the 19th and 20th of January, 1856, with these written proposals in their hands, a meeting took place at Brighton between this witness, the plaintiff, and the defendant Valentine Elwes, when again everything was fully discussed and considered. But no mention was made of the 100,000*l*. In the whole body of evidence on behalf of the plaintiff, oral and documentary, there is not one passage to prove that there was any agreement to keep alive the charge of 100,000*l*., nor any evidence that it was even mentioned.

Mr. Barnard, who took so active a part, says that he cannot positively swear to having informed the defendant Valentine Elwes of the charge of 100,000*l*. Yet he says it is his full conviction that he more than once did, and in particular in a conversation previously to the defendant's departure for the Cape of Good Hope, in the year 1851. There seems, however, no reason to doubt that the defendant Valentine Elwes, long before the resettlement in 1856, was aware of the charge of 100,000*l*. in favour of his sisters, and he says so in his letter of the 26th of August, 1857, written immediately on receiving the first communication of the notice that a mistake had been committed. His reply to the suggestion of a mistake seems to contain intrinsic evidence that, so far as he was concerned, it had never been even proposed to him to keep it alive, and that if it had been proposed he would have objected. There is plain good sense in the view which he takes of it as soon as such a thing was sug-

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gested. He says: "Supposing that I have daughters—say three or four—and no son, then at my death my sisters (if the 100,000*l.* charge was continued) will be better off than my daughters. I must say I cannot see the right of that. Not that I wish for one moment to prevent my sisters having the 100,000*l.* in case of the estates passing away, but I must say I think my daughters ought to come in for their share of something."

The result of the evidence is, that the defendant Valentine Elwes never was asked to agree to keep the charge in existence. It is, perhaps, equally true that the omission of any stipulation on the subject was an oversight on the part of the plaintiff and Mr. Barnard. It is so described in Mr. Barnard's first letter to the defendant, mentioning that it had been omitted by mistake. He says, "The omission appears to have been so perfect an oversight, that I conclude you never heard a syllable about it."

It seems impossible, after this, to see on what solid ground the plaintiff can have any decree to rectify the settlement. This Court has jurisdiction to rectify a settlement so as to make it correspond with the terms actually agreed upon. The right to relief in such a case must be founded on distinct evidence of the terms of the agreement, so as to show that the settlement, as executed, does not conform to the agreement, but has by a mistake omitted or altered some material stipulation.

The mistake in this case is not in the settlement, which is exactly in conformity with the written agreement, and with what was arranged between the parties. What is really sought for by the plaintiff is to rectify the oversight of not making any agreement at all on the point in question.

There may be cases in which the Court will relieve against an agreement on the ground of surprise or mistake. In such cases, the agreement is set aside and both

parties restored to their antecedent rights. But there is a wide difference where the Court has to deal with a family settlement deliberately made in pursuance of an agreement deliberately arranged and fully understood.

It may be assumed that the plaintiff and Mr. Barnard did not contemplate the destruction of the charge, and would not have agreed to destroy it. But it was a charge limited to take effect after the estate tail of the defendant Elwes, who therefore had the right and the power to destroy it, and the agreement to disentail was an agreement for its destruction. Taking it for granted that the omission to stipulate for its restoration was a mistake on the part of the plaintiff, and that the execution of any resettlement which did not provide for its restoration was clearly contrary to his intention—unless it be shown that it was also contrary to the intention of the defendant Valentine Elwes, who was the other contracting party, there can be no right to relief. No settlement has ever been altered or reformed on the ground that a stipulation, which was wished and intended by one of the contracting parties, but never agreed to or ever mentioned, or brought to the attention of the other of the contracting parties, had been omitted.

As the case of the plaintiff has wholly failed, the bill must be dismissed with costs.

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Jan. 25th.

Judgment by default against an executor in respect of his testator's debt, is an admission of assets, and binds the executor's own real and personal estate as fully as if it were his own debt. Therefore, where an executor allowed judgment to go by default in an action against him as executor—*Held*, that the judgment creditor was entitled to priority over a subsequent judgment obtained against the executor for a personal debt of his own.

Re THE TRUSTEE RELIEF ACT, 10 & 11 Vic.
c. 96. HIGGINS'S TRUSTS.

ON the 11th of June, 1858, Thomas Williams commenced an action against William Higgins, as executor of Richard Higgins, jun., deceased. The action was brought on a bond given by Richard Higgins and his son Richard Higgins, jun., in a penal sum of 600*l.*, conditioned for payment of 300*l.* and interest. On the bond was indorsed the following:—

“I, William Higgins, of Hay, solicitor, as well the executor as devisee of the late Richard Higgins, jun. (an obligor within named), do hereby admit and declare my liability to the within debt, with ample assets to pay the same. Witness my hand, the 8th of October, 1844. William Higgins, of Hay, Attorney-at Law.”

The writ was as follows: “Herefordshire, Exchequer—Writ of summons for Thomas Williams against William Higgins, executor,” &c. In the writ of summons the defendant was also described as “William Higgins, executor of the last will and testament of Richard Higgins the younger, deceased.”

The indorsement was as follows:—

“The following are the particulars of the plaintiff's claim: 322*l.* for principal and interest due upon a bond dated the 15th day of March, 1841, given by Richard Higgins the elder, and Richard Higgins the younger to the plaintiff, together with interest on 322*l.* at 5*l.* per cent. from the 15th of March, 1858, till payment.”

On the 23rd of June, 1858, the judgment was signed as follows:—

“Thomas Williams, by Thomas Westall, his attorney, sued out a writ of summons against William Higgins,

executor of the last will and testament of Richard Higgins the younger, deceased, and was indorsed thus: the following are the particulars. "And the said William Higgins has not appeared; therefore it is ordered that the said Thomas Williams do recover against the said William Higgins 323*l.* 17*s.* 6*d.*, together with 4*l.* for costs of suit."

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The judgment was registered as follows:—

"Thomas Williams *v.* William Higgins, executor of the last will and testament of Richard Higgins, the younger, deceased. Debt 323*l.* 17*s.* 6*d.*, and 4*l.* costs."

On the 18th of July, 1858, a *fi. fa.* was issued on this judgment directed to the sheriff of Herefordshire, who made a return that he obtained from the goods of William Higgins 175*l.* 19*s.* 8*d.*, of which he had retained 25*l.* 15*s.* 4*d.* for expenses, &c., and had paid to Thomas Williams (the plaintiff in the action) the residue of 150*l.* 4*s.* 4*d.* as part satisfaction of his debt, &c. He also returned that William Higgins had no other goods within his bailiwick.

On the 10th of December, 1858, Thomas Williams obtained a writ of *elegit*, which was addressed to the sheriff of Radnorshire, against the real estate of the said William Higgins. The writ recited the other proceedings, but it was not executed by the sheriff, in consequence of there being a prior legal estate of the same lands vested in other persons.

Another judgment was also, on the 23rd of June, 1858, obtained in an action at the suit of the said Thomas Williams against Richard Higgins, in respect of the same debt of 327*l.* 17*s.* 6*d.*, but was not registered. By a deed of the 26th of November, 1858, the said two judgment debts of 327*l.* 17*s.* 6*d.* (less 154*l.* 19*s.* 4*d.*) were assigned by Thomas Williams to William Samuel Price Hughes; and by another deed of the 4th of May, 1859, the said two judgment debts were assigned at Mr.

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Richard Higgins's direction to Henry Hughes, as a collateral security for a debt of 1700*l.* and interest.

Thomas Sowdon, one of the registered public officers of the Herefordshire Banking Company, commenced an action against William Higgins, and obtained judgment for 1503*l.* 15*s.* 6*d.*, and 4*l.* for costs, which was registered on the 14th of July, 1858.

The fund, which formed the only remaining assets of William Higgins, had been paid into court under the Trustee Relief Act by a mortgagee, who had realised his security and paid the residue (the fund in question) into court.

A petition was now presented by W. S. Hughes and Henry Hughes, that the fund might be applied in satisfaction of the judgment debt in a due course of administration. The petitioner claimed priority over the judgment obtained by the officer of the bank.

Argument.

Mr. *Craig*, with Mr. *Whitworth*, for the first judgment creditor, contended that judgment against an executor, by confession or default, was an admission of assets; and he was estopped from disputing it, and so was a jury: *Rock v. Leighton*(*a*). That he might have pleaded a *riens ultra*, was admitted; but not having done so, he had confessed assets in answer to the second as well as the first judgment(*b*).

In *Erving v. Peters*(*c*) it was held that if an executor to an action on a bond plead payment, and omit to plead *plene administravit*, and a verdict be given against him on such plea, it operated as an admission of assets in an action founded on that judgment, suggesting a *devastavit*(*d*).

(*a*) 1 *Snk.* 310.

(*b*) *Ibid.* 4th clause.

(*c*) 3 *D. & E.* 685.

(*d*) See *Ramsden v. Jackson*,
1 *Atk.* 293, in which Lord Hard-
wicke refers to *Rock v. Leighton*,

[*Leonard v. Simpson*(a) was also cited.]

If, then, the judgment bound the executor's assets by the section of the 1 & 2 Vic. c. 110, it became a charge on the land.

It was admitted the *elegit* was inoperative; but it showed that a writ might issue against the land of an executor who had by default admitted assets(b).

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Mr. *Southgate*, for the second judgment creditor, contended that judgment against the executor was in his capacity of executor, and must be postponed to a judgment against him in respect of his own debt.

Secondly, supposing the judgment by default amounted to an admission of assets, and might make the executor liable for costs *de bonis propriis*, it could not make the judgment binding against the executor's land.

[*Smith v. Tateham*(c) was cited.]

THE VICE-CHANCELLOR:—

The law, as established by the cases of *Rock v. Leighton* and *Erving v. Peters*, is, that when a man is sued as executor, and allows judgment to go against him by default, that judgment is an admission of assets of his testator, and as such binds his own assets both real and personal. The petitioners are therefore entitled to priority in respect of their judgment over the other judgment creditor.

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and states that the report of that case in *Salkeld* is incomplete; and understands that decision to amount to no more than this, that a party who omits at the proper time to take the right defence cannot do so afterwards.

(a) 2 Bing. N. C. 176; s. c. 2 Scott, 335.

(b) By the 124th section of the

Common Law Procedure Act, 1852, it is provided that a writ of execution issued after the commencement of the Act, if unexecuted, shall not remain in force for more than one year from the teste of such writ.

(c) 2 Ex. 205, cited in 2 Archbold's Practice, by Prentice, 1158.

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Where a lease contained covenants not to assign or underlet, with a proviso that in case the tenant should, voluntarily or otherwise, lose possession of the farm, the lessor might re-enter: the Court held that the assignees in bankruptcy of the tenant (the lessor having accepted rent from the assignees) were in by contract with the lessor, and not by operation of law, and were therefore bound by the covenants in the lease.

The assignees, after an injunction restraining them from parting with possession without the lessor's consent, put into possession an agent, who cultivated the farm with his own monies, receiving no wages from the assignees. —*Held*, an evasion of the injunction.

SIR P. H. DYKE v. TAYLOR.

IN this case two motions came on by arrangement together: one to continue an injunction granted by Vice-Chancellor Kindersley on the 13th of September, and the other to commit the defendant for breach of that injunction.

The bill was filed by Sir Percyvall Hart Dyke, of Lullingstone Castle, in the county of Kent; and it alleged that, by an indenture of lease, dated the 26th of April, 1856, and made between the plaintiff of one part, and William Dray, of Farningham, Kent, agricultural implement maker, of the other part, a messuage and farm called Pedham Place Farm, with barns and appurtenances, lands and hereditaments, containing about 435 acres, in the parishes of Farningham and Eynsford, were demised by the plaintiff to the said William Dray for a term of twenty-one years from the 29th of September, 1855, at a yearly rent of 476*l*. By the said indenture the said William Dray, for himself, his heirs, executors, and administrators, covenanted with the plaintiff, amongst other things, that he the said William Dray, his executors and administrators, would at their own proper costs and charges, from time to time at all times during the said term, well and sufficiently repair, amend, support, maintain, uphold, paint, scour, cleanse, drain, and keep the said messuage or tenement and buildings thereby demised, and all other erections and buildings which during the said term might be erected and set up by the said William Dray, his executors, administrators, or assigns, upon the homestead belonging to the said premises. Also, that at the expiration or other sooner determination of the said term, the said William Dray,

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his executors, administrators, or assigns, would leave, surrender, and yield up the said buildings and premises, being so well and sufficiently repaired, upheld, supported, maintained, drained, cleansed and kept in repair as aforesaid, unto the plaintiff or the person entitled to the reversion of the said premises. Also, that he the said William Dray, or some good and responsible person or tenant to be from time to time approved by the plaintiff, and the person or persons so entitled as aforesaid, would at all times during the said term personally reside and dwell in and upon the said messuage, farm and premises called Pedham Place, so that the same might be kept well aired and ventilated, and maintained in good order and condition. Also, that the said William Dray, his executors, administrators, or assigns, would not at any time during the continuance of the said term assign, underlet, or otherwise dispose of or part with the possession of the said messuage, farm, lands, and hereditaments, without the consent in writing of the plaintiffs and the persons entitled as aforesaid. The indenture also contained a proviso, that, in the event of the non-payment of rent or breach of covenants, "or in case the said William Dray, his executors, administrators, or assigns, or any of them, should, by their or his own act, default, or procurement, whether voluntary or not, or by act of law, or by virtue of or under any Act of Parliament, or by or through all or any such means, lose, be deprived of, or cease to be entitled to the possession or enjoyment of the said farm, lands, and premises thereby demised, or any part thereof, or the said term thereby granted, either wholly or in part thereof, without the consent in writing of the said Sir P. H. Dyke, and the person or persons entitled as aforesaid, then and thenceforth in any one of the said cases, it should be lawful for the said Sir P. H. Dyke, and the person or persons entitled as aforesaid, into and upon the

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said premises, &c., to re-enter and the same to repossess as in his and their former estate."

In November, 1855, William Dray executed a counter-part of the lease, and entered into possession. The messuage and farm were within a short distance of Lullingstone Castle; and in granting the lease the plaintiff was desirous of guarding against the possibility of the tenant of the said messuage and farm not being a person of his own choosing; and the bill alleged that it would cause great personal annoyance to the plaintiff if the messuage and farm should be assigned to a person who should not be chosen or approved by the plaintiff.

On the 21st of October, 1859, he was adjudicated bankrupt, and the defendant Taylor was appointed creditors' assignee, and Henry Cannan official assignee, and they took possession of the farm. Some negotiations as to finding a tenant took place, but without success. The defendants proposed one tenant, a Mr. Stone; but the parties could not agree on the terms.

On the 6th of July, 1860, the defendant's solicitor sent to the plaintiff a cheque for 260*l.* for rent due Lady Day, 1860, and on the 10th of July the plaintiff sent a receipt for the rent. On the 28th of August, the assignees advertised the lease for sale. On the 13th of September, the plaintiff filed the bill, praying *inter alia* that the defendants and their agents might be restrained by injunction from selling, assigning, or underletting, or otherwise disposing of or parting with the possession of the said messuage, farm and premises, without such consent as in the said indenture mentioned.

The bill charged "that, under the circumstances therein mentioned, the defendants had become and were assigns of the said lease by act and operation of law," and that the covenants were in full force and binding upon the defendants, and that the defendants were not entitled to

sell or assign without such consent as in the said indenture mentioned.

It appeared that the assignees had permitted Mr. Stone to enter into possession of the farm, as they contended, as their agent; but, as the plaintiff alleged, under an agreement for a lease. On the 26th of October, the plaintiff served notice of motion to continue the injunction, and on the 30th of October moved to commit the defendants for contempt. Both motions stood over from time to time, and now came on together. On the question of the contempt, evidence was gone into to show that Mr. Stone was a mere agent of the assignees. Mr. Stone's cross-examination was as follows:—He said he left the day before on the farm 200 sheep. They were his sheep. He was acting as a sort of agent on the farm. There were twelve working horses on the farm, eleven of which belonged to him. He had some agricultural implements on the farm which belonged to him. He took possession on the 13th of October, and signed the memorandum on the 15th. He did not remember his being bailiff as mentioned in the conversation on the 13th. He was to be agent. Whatever he paid for this farm in the way of cultivation he was to be paid for. He was not to be paid for his own time and labour; and no interest was to be allowed him for money advanced for the farm. Two memorandums were produced, as follows:—"To Mr. A. Stone. Be good enough to act as my agent at Pedham Place, and I shall be happy to reimburse you any outlay you make in doing so, unless you ultimately accept an assignment of the lease of the said farm to Mr. William Dray. Dated 15th of October, 1860, Robert Taylor." "Pedham Place Farm, October 13th, 1860. Dear Sir,—I hereby acknowledge that your taking possession of the farm and the other lands held therewith this day from me, as assigns of Mr. Dray, a bankrupt, shall be of no effect, and shall not be considered

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as not creating any tenancy on your part, in the event of the agreement between us now under consideration not being signed and completed on Monday next.—Yours truly, R. T.”

On the motions being brought on, the Vice-Chancellor suggested that they ought to stand over till the hearing of the cause; but the parties declined to accede to that suggestion.

Argument.

Mr. *Malins*, Mr. *Southgate*, and Mr. *J. W. Chitty*, for the plaintiff, contended, first, that the injunction must be continued; and secondly, that the defendants had disobeyed the order of the Court, by putting Stone in possession of the farm.

Mr. *Bacon* and Mr. *E. T. Smith*, for the defendants.—The covenant to reside on the farm was merely personal between the landlord and his tenant, and did not bind the assignees.

In *Doe dem. Goodbehere v. Bevan (a)*, it was held that assignees in bankruptcy may assign a lease without the consent of the lessee, notwithstanding a covenant by the lessee, his executors, administrators, and assigns, not to underlet or assign without the lessee's consent; and though there was a proviso for re-entry in case of breach of covenant. Here the defendants are assignees by operation of law, and are bound to sell.

In *Whitchcot v. Fox (b)*, it was held that acceptance of rent from an assignee is a waiver of a condition not to assign, and here the landlord accepted rent without objection.

On the question of committal, they contended that the assignees were bound by their duty to put some person into possession, to take care of the farm; but as long as they did not part with the possession, the plaintiff was not damnified.

It was contended, also, that the injunction, so far as it

(a) 3 M. & S. 353.

(b) Cro. Jac. 398 (ed. Leach).

restrained the sale of the bankrupt's farming implements, &c., was clearly improper, and ought to be dissolved.

THE VICE-CHANCELLOR:—

The plaintiff is a landlord, who granted a lease at a very low rent, and upon terms very beneficial to the bankrupt. The lease contains extraordinary stipulations, giving powers of a very unusual kind to the landlord. These powers the landlord reserved to himself for an obvious purpose. It would be obviously much for his comfort and for his benefit to have the power of dictating who should reside upon the farm in case the lessee himself did not reside upon it. The farm adjoined the domain and mansion-house of the plaintiff, so that it was very desirable for the landlord to have large powers in selecting the person who should reside upon a farm so near to his own dwelling. That the rent was very much reduced below the real value of the rent of the farm in consequence of these extraordinary powers in the lease is manifest from this, that the assignees say that the lease would be worth several thousand pounds to them, if they could get rid of these powers.

The duty of the assignees is to lose no opportunity of disposing of everything to which the bankrupt can claim a fair right, upon the most advantageous terms. In a case of this kind, the duty of the Court is to hold an even hand between the assignees, considering their duty to the bankrupt's estate on the one hand, and to the landlord, who, by express and careful stipulations, has reserved to himself such large and valuable powers. It has been decided at law that a covenant not to assign does not bind assignees in bankruptcy who have acquired a right to the lease by operation of law. Unfortunately in this bill there has slipped in an allegation that the defendants are tenants of this farm by operation of law. But this averment is not an

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avermment of a matter of fact, but of a matter of law, and it seems to me contradicted by the facts stated in the bill. The plaintiff and defendants seem to agree upon this, that according to the stipulations in this lease, lawfully made, the assignees in bankruptcy could have no right to this lease at all, through any act of the tenant alone; for there is a carefully and well-expressed proviso that in event of bankruptcy the landlord shall have an absolute right to re-enter and avoid the lease. Therefore, according to the stipulations of this lease, following what Lord Ellenborough said, and what has been the usual practice in consequence of the effect which assignees coming in by operation of law have upon the rights of a landlord, this proviso has been properly introduced, which has put an end, or would have put an end, if the landlord chose, to any right to the lease at all. The right of the defendants as assignees in bankruptcy to be considered tenants arises not from any operation of law, but from the circumstance of the landlord having consented to receive rent from them, and to accept them as tenants; and he having accepted them as tenants, I consider that they are tenants by contract with the landlord, and bound by all those stipulations in the lease which were intended for the benefit of the landlord. If that be a correct view, the result is, that the value which these assignees expect to realise by dealing with this landlord as if they were not bound by the covenant which the landlord introduced for his own benefit, is a view entirely mistaken.

This question is one of vast importance, and it is greatly to be regretted that, merely upon an interlocutory application, such a question should be dealt with, when the effect and result must be that, whatever order is made now, must be to keep both the landlord and the assignees in bankruptcy in a situation which must occasion great expense, great inconvenience, and, if the assignees are entitled to assert that claim, must greatly deteriorate

their right. For that reason I pressed upon the parties to have this motion treated as a motion for a decree. No great inconvenience would have resulted from that course. But the parties declining to treat this as the hearing of the cause, if there be a doubt upon the question, the duty of the Court is by its injunction to prevent as far as possible the rights of either party being disturbed, until at the hearing of the cause the real question is determined. That view of the case puts the assignees to this disadvantage, that an argument against the granting of any injunction comes with much less force, considering that by refusing the injunction now, when the cause comes to be heard, it will be impossible to re-instate the landlord in that position which would be his right, if he be entitled to the judgment of the Court as to the enjoyment of the covenants which he has inserted in the lease. The question of law as to the waiver of the right of re-entry having put the assignees in bankruptcy in the situation of being merely assignees in law, seems to me to be a question which, if I must determine it now, I must determine against them. I must consider them as coming in by contract, and therefore bound by the stipulations in the lease. That being so, the duty of the Court is to grant, until further order of the Court, an injunction in the latter part of the terms of the covenant in the lease, rather than in those of the injunction as already granted.

The other question is, whether a breach of the injunction has been committed by the way in which the defendants have dealt with the possession of the farm. The material words of the injunction upon this question are those which prohibit the defendants from parting with the possession of the farm. The defendants' case is that they have not parted with the possession, but that they are now in possession; and that Stone is acting as their bailiff. The case of the plaintiff is, that

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Stone is only colourably in possession as bailiff. He entered into possession of the farm, wishing to be tenant. He is now in possession of the farm with a stock of sheep, which are his own property, pastured upon it, for which it is not pretended that he is to pay any rent. He has eleven horses upon the farm, which are his own property, and which it is pretended the defendants have hired from him—agricultural implements of every kind, his own property, and used upon the farm by him as his own. These circumstances are wholly irreconcilable with the character of bailiff. Taylor's statement is exactly to the same effect. But the circumstance that no remuneration or wages or hire of any kind is paid to Stone for himself, or his horses, or his implements of husbandry, sufficiently shows that he has not sustained the character of bailiff; and that the defendants have parted with the possession of the farm to Stone, not as their bailiff, but as an expecting lessee. Where the Court has prohibited the defendants in express terms from parting with the farm to any other person, it is impossible to treat their conduct in putting Stone into possession on the footing of his becoming lessee, as submission to the injunction. It was a device hit upon to evade the injunction, such as cannot be sanctioned by this Court. The case is not one for committal. The duty of the Court will be sufficiently performed if there be an order that they pay the costs of the motion to commit them.

CLAYTON v. CLARKE.

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THIS was a motion to vary the chief clerk's certificate. The bill was filed by a young lady, named Clayton, by her next friend, J. H. W. Fenton, against the infant's mother, Elizabeth Lewis, and her (second) husband, and Joseph Clarke, to administer the estate of Mr. Sykes Clayton, the infant's father. Mr. Clarke and Mrs. Lewis were the executors and trustees of the will of Mr. Sykes Clayton, and were also testamentary guardians. The principal property to which Mr. S. Clayton was entitled, was one undivided third share of certain hereditaments in Yorkshire, under the will of his grandfather, John Clayton, whose estate was being administered in the suit of *Fenton v. Clarke*, to which Mr. Sykes Clayton was a party at the time of his death. Previously to the present suit, there had been a suit by the trustees of Mr. Sykes Clayton's will, against the trustees of John Clayton's will, to which the next friend in the suit was a party.

Bill by a next friend of an infant to administer an estate, in respect of which, it appeared from the answer, the defendants had already rendered an account in another suit. The defendants submitting that the suit was not instituted for the benefit of the infant—the Court directed an inquiry, whether any benefit had accrued from the suit to the infant; and the chief clerk having certified in the negative, the Court refused to allow the next friend his costs. *Nalder v. Hawkins* (a), considered.

The defendants by their answer insisted that the suit was instituted at the instigation of Mr. John Naylor Clayton, the surviving trustee of John Clayton's will, an uncle of the infant, and a party to the two former suits; that the present suit could not afford any information which was not already in the power of the next friend, and of the infant's uncle, Mr. J. N. Clayton, and of Mr. Fenton; that "the suit was not instituted for the benefit of the infant; that it could in no respect be beneficial to her;" that it was altogether uncalled for and vexatious; and prayed that the next friend should be ordered to pay the costs.

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The defendants also moved that the bill might be dismissed, or that all further proceedings might be stayed, or that it might be referred to chambers to inquire whether it was fit and proper that the present suit should be further prosecuted. Upon this motion, his Honour directed an inquiry at chambers, whether any and what benefit had accrued to the infant from the institution of the suit, suggesting at the same time that the defendants should submit to the ordinary administration decree, to which they consented.

The chief clerk, in pursuance of this decree, had made a certificate, by which it appeared that there was a balance of 263*l.* in the hands of the executors; it also appeared that the mother of the infant, who was one of the executors, was in a position to claim, if she chose to do so, a large amount from the infant's estate; but the chief clerk, as the result of all his inquiries, certified that "no benefit had accrued to the infant plaintiff from the institution of the suit."

It was shown by the evidence that Mrs. Lewis, the mother of the infant plaintiff, had always acted with kindness towards the infant, and had sacrificed to some extent her own life-interest for the benefit of her daughter. Mr. Fenton, the next friend, now moved that the chief clerk's certificate might be varied by introducing statements to the effect that certain benefits had accrued to the infant from the institution of this suit. He mainly relied upon the fact that a balance had been shown to have been in the hands of the executors; and that the latter were thereby compelled to pass their accounts.

Argument.

Mr. Malins and Mr. Chapman Barber, for the motion.—The Court always regards with favour those who, *bonâ fide*, come forward to protect the interests of an infant. In this case, it is clear a benefit has accrued to the infant, as the accounts have been taken in a proper way, and the

inquiry has shown that a considerable balance had been allowed by the executors to remain in their hands uninvested; but, even if this were otherwise, and the certificate were literally true, it was submitted that the next friend having acted *bonâ fide*, it would be a most dangerous precedent to refuse him his costs.

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Mr. Bacon, Mr. W. D. Lewis, and Mr. J. N. Higgins, for the defendants.—The inquiry was properly directed on the authority of *Nalder v. Hawkins* (a); but if so, it is impossible, in the face of the certificate, to treat the suit as properly instituted. It was submitted, therefore, the next friend ought to pay the costs of the suit, or, at all events, ought to be allowed no costs out of the infant's estate.

THE VICE-CHANCELLOR:—

Judgment.

This is a suit instituted by a next friend and relative of an infant, against the infant's mother and her co-executor and co-trustee, for the administration of the estate of the infant's father. Before any decree was made in the cause, the defendants moved to stay all proceedings in the cause. Upon that motion being discussed, the answer filed by the mother and her second husband, and by the co-trustee Clarke was before the Court. The Court ascertained from that answer that the next friend of the infant in this suit was himself a plaintiff in the suit of *Fenton v. Clayton*, pending in another branch of the Court, and praying for the administration of the estate of another testator, whose assets were intimately connected with the assets of the testator in the present suit; and it appears from the statements in the answer that in that suit of *Fenton v. Clayton*, before the Vice-Chancellor Kindersley, the defendants

(a) 2 M. & K. 249.

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in this suit, who were also defendants in that suit, had been obliged to render accounts of the assets of the testator, which, according to the statements in the answer, sufficiently show the state of the infant's right to the assets of her father.

The defendants in this suit were the accounting parties in both suits; and, in that state of things, the Court, upon the motion for staying proceedings in this cause, certainly thought that it was not likely any benefit would accrue to the infant from further prosecuting the present suit.

Inasmuch as technically no decree was made, nor such accounts taken as would be taken under a decree for administration, it was impossible to arrive at any certainty upon the point, unless the accounts were regularly taken in the present suit.

But the Court, in directing these accounts to be taken, ordered that the chief clerk should inquire and certify whether any and what benefit resulted to the infant from the present suit. That inquiry was made, and a decree for the whole administration accounts in the present suit, entirely at the instance of the next friend, and to give him an opportunity of vindicating his conduct.

The certificate has now been made, and the assets have been accounted for. It is in vain to say that any material alteration has been found upon the strict account that has been taken, in the account of the assets, from what was given in the answer of the defendants. The result is, that the chief clerk has certified that no benefit has accrued to the infant from the institution of this suit.

But, upon the motion to vary the certificate, the next friend has introduced an affidavit which was before the chief clerk, but which the chief clerk thought he could not, with propriety, introduce into the certificate as read before him. That affidavit, however,

has been read before the Court now, and the object is to show that the defendants, Mr. and Mrs. Lewis and Clarke have been guilty of a breach of trust. The bill charges no breach of trust. The bill is the common bill for the administration of the testator's estate, at the suit of an infant who has a beneficial interest under the will. In consequence of this affidavit, the defendants have asked leave to give further evidence in explanation of their conduct in selling out the money and re-investing it in the beginning of the present year. If I had any doubt upon the question, I could not refuse these defendants the opportunity they ask. But I have no doubt. Their conduct requires no explanation. Their answer, which seems to me wholly unimpeached by any evidence of any kind, shows that the mother of this infant and her second husband, with the concurrence of the trustee Mr. Clarke, who joins with them in the defence, have, through a mass of litigation conducted by the present next friend as plaintiff in the other suits, at the sacrifice of their own interests, acted in a way not only generous, but in the highest degree kind and considerate, with a view to the benefit of the interests of the infant. So far has it been carried, that the mother and her second husband, being under no obligation to do so, have sacrificed their interest, by mortgaging the mother's income for the purpose of raising a sum of money to prevent a disadvantageous sale of part of the infant's estate. The particular charge, as to selling out the stock and not re-investing it till about the time when the suit was instituted, seems to me to require no further investigation. If I were to direct any, it would be whether any breach of trust has been committed by them. But there has been too much inquiry and investigation already, where the result has only produced costs, and continued the vexation of a family quarrel. I cannot find any just ground for varying the chief clerk's cer-

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tificate, or anything further to be inquired into or explained as to the sale and re-investment of that stock. It is sufficiently explained by the situation of this mortgage, where the mortgagee was entering into a negotiation with the defendant for paying off the mortgage money for the benefit of the estate. That is explanation enough. As I find no ground for varying the certificate of the chief clerk, I must refuse the application for varying it with costs. I think the more discreet course for the next friend would have been to have stopped there, and to have submitted to what appears to be a perfectly right certificate. But there seems to me no necessity for the further prosecution of the suit; and the proper order on further consideration will be to stay all proceedings in the suit till further order, with liberty to either party to apply.

With regard to the question of costs of the next friend, there is no case in which the Court has allowed the next friend costs in the face of such a certificate. In the case of *Nalder v. Hawkins* it was sent to the master—as was done in this case to the chief clerk—to inquire whether the suit substantially was beneficial. The Lord Chancellor said he should direct the inquiry not only as to the suit being for the benefit of the infant, and if it were, as to the proper person to conduct it; but the master must inquire whether the next friend named was the proper person. That case was the subject of great consideration, and was very much talked of in the profession at that time; and the decision in that case had the salutary effect, I am satisfied, of preventing many improper suits. The Court throws no discouragement in the way of persons *bond fide* suing as next friends; but will give no undue facility to volunteers interfering, who interfere for their own purposes, rather than for the infant's advantage.

Lord Thurlow said, in the case of *Whittaker v.*

Marlar)a), “Whoever will stand forward in the character of next friend is to be encouraged to every possible extent, while it can be supposed to tend to the infant’s benefit.” But in that case he dismissed the bill, and ordered the next friend to pay the costs. What the Court has to do is to hold an even hand, and if there be a doubt, to decide it rather in favour of the next friend. Where there is a suspicion, the Court must inquire further, and ascertain whether it has been a beneficial suit. That inquiry has been made here, and it has been found that no benefit has arisen from the suit; therefore, pursuant to the course of the Court, I do not see how it is possible for the Court to make the estate of the infant pay the costs of the next friend, where that suit has not produced any benefit. There will, therefore, be no costs allowed to the next friend. The motion to vary the certificate will be refused with costs.

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(a) 1 Cox, 285.

1861.

*February 7th,
8th & 9th.*THE MARQUESS OF BUTE *v.* STUART.

Where this Court had appointed a guardian, and settled a scheme for the education of an infant peer, who was entitled to large estates in England and Scotland, it restrained the tutor dative from continuing certain proceedings in the Court of Session relative to the education and residence of the infant and as to his English estates which had been instituted in Scotland, so as to supersede the scheme approved by this Court.

The Court of Session has no power to alter, vary, or discharge any order of this Court made under the jurisdiction of the Great Seal; which is as much the Great Seal of Scotland as of England.

THE Marquess, who was born on the 12th of September, 1847, was entitled to large real estates in England and Wales, and in Scotland.

By an order of his Honour, dated the 10th of May, 1848, made on petition, the Marchioness of Bute was appointed guardian. Shortly after her death, in December, 1859, by an order dated the 7th of February, 1860, General Stuart and Lady E. Moore were appointed guardians of the infant, till further order. In November, 1859, Col. Crichton Stuart obtained letters of tutory dative to the infant plaintiff in Scotland.

The bill alleged that, at the date of the last-mentioned order, it was arranged that the plaintiff should be delivered by Lady E. Moore, as soon as conveniently might be, to the charge of General Stuart. On the 22nd of March, 1860, Lady E. Moore arrived in London, bringing with her the plaintiff; and while in London, being desirous of retaining the plaintiff in her own charge, and apprehensive that the Court would direct that he should be delivered to General Stuart, she suddenly and clandestinely, on the night of the 16th of April, 1860, removed the plaintiff to Scotland without the leave of the Court.

Pursuant to order, the chief clerk made a certificate dated the 10th of May, 1860, containing a scheme for the maintenance of the plaintiff, part of which was, "that the infant Marquess, with a tutor, was to reside with his guardian the said Charles Stuart, or where the said Charles Stuart should consider proper, till the end of August, 1860, and was then to be sent to a proper private

school; and, on his attaining the age of fourteen, was to be sent with a private tutor to Eton or Harrow, as his guardian the said Charles Stuart might determine." The net annual proceeds of the English and Welsh estates were 76,000*l.*, and the net annual proceeds of the Scotch estates were 17,000*l.*, making together 93,000*l.* Out of the former, a sum of 2,500*l.*, and out of the latter a sum of 4,500*l.*, making altogether 7,000*l.* a year, was to be set apart for maintenance and education of the infant, and for keeping up the establishments in Scotland.

General Stuart endeavoured to induce Lady E. Moore to give up the infant, but without success. By an order of his Honour, dated the 6th of July, 1860, made on petition, the scheme was confirmed, and it was ordered that Lady E. Moore deliver up the infant to General Stuart, and that she be removed from her office as guardian; and also that General Stuart be continued guardian, and that he be at liberty to take all necessary steps, (if any) according to the law of Scotland, to obtain delivery up of the infant. Lady E. Moore having refused to obey the order, on the 13th of June, 1860, General Stuart, with Lady A. K. Murray (the infant's next of kin) and her husband, presented a petition to the Lords of Session, that the infant might be delivered up in conformity with the order of the 6th of July, 1860.

The petition came on on the 20th of July, 1860, and was adjourned till November, the tutor dative having appeared on the petition and supported the prayer.

In October, 1860, Col. Crichton Stuart, the tutor dative, presented a petition to the Lords of Session for the removal of the infant from Lady E. Moore's custody, and for directions for the custody and maintenance of the infant. On the 5th of November, 1860, the Lord Ordinary made an order on the petition, restraining Lady E. Moore from removing the infant out of the jurisdiction.

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On the 14th of November, 1860, answers were put in by General Stuart and Col. Stuart to the cross-petition, and on the 21st of November, 1860, the Court of Session required General Stuart to prove strictly his petition. At this time, the infant was under the care of the Earl of Galloway, who had temporarily taken charge of him.

On the 22nd of November, 1860, Col. C. Stuart laid before the Court of Session a minute of an interim arrangement which he proposed for the sanction of the Court, and which was to the effect that the Marquess should be placed at Loretto School, near Musselburgh, kept by the Rev. Thomas Langhorne, for education, and that, previously to his going to school, and during the holidays, he should remain at Galloway House.

The Court of Session, on the 23rd of November, 1860, approved of the scheme, and at the same time ordered that the plaintiff should not be removed from the jurisdiction of the Court of Session.

General Stuart did not oppose the order, but contended that it ought to be expressed in the order that such arrangement was to be continued only till the final disposal of his petition.

Lady E. Moore, on the 26th of November, 1860, delivered up the plaintiff to the custody of the Earl of Galloway.

By an order of this Court, dated the 13th of December, 1860, after reciting that the petition of General Stuart in Scotland was not such a step as was authorised by the order of the 6th of July, 1860, it was ordered that General Stuart should not further prosecute the said petition; that he should be at liberty to apply to this Court as he might be advised touching the present custody of the plaintiff, or as to the steps necessary for duly enforcing obedience to the order of the 8th of July, 1860, and that in the mean time General Stuart should be at liberty to permit the plaintiff to reside with the Earl of Galloway.

A bill was filed on the 13th of June, 1860, and finally amended on the 21st of January, 1861. The defendants were General Stuart, Col. Crichton Stuart, and the trustees and executors of the late Marquess's will, praying that the fortune and person of the plaintiff might be placed under the protection of this Court, and for an injunction as above stated.

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On the day on which this motion came on, viz., the 7th of February, 1861, the Court of Session made an order on Col. Crichton Stuart's petition, to which General Stuart did not appear. That order, after reciting that the petitioner as tutor-at-law had the sole legal title and right of administering the Scotch estates of the pupil, the Marquess of Bute, during his pupilarity, and was also during the same period vested with the exclusive right, and charged with the duty of providing for the custody, residence, and education of the pupil, subject to the orders of the Court—and that the order made by interlocutor of 23rd of November, 1860, was subsisting and effectual; and that no grounds had been stated, and no circumstances had occurred to render any alteration of the said arrangement necessary or expedient—ordered the petitioner to take all necessary steps for having the said arrangements so approved by the interlocutor of the 23rd of November, 1860, carried into effect as a permanent arrangement, to subsist until the pupil attained the age of puberty. The order further prohibited the petitioner, and also the Earl of Galloway, from removing the pupil beyond the jurisdiction of the Court, or from interfering with his custody, residence, and education, as settled by the orders of the Court; and Colonel C. Stuart, and all other persons, were prohibited from removing, or aiding in removing, the pupil from the jurisdiction of the Court, or from interfering in any way to prevent the said arrangement for his custody, residence, and education being carried into full execution.

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Mr. *Bacon* and Mr. *C. T. Simpson*, for the plaintiff, now moved to restrain the defendant, Col. C. Stuart, from further prosecuting the proceedings in Scotland as to the person of the infant. The only question was as to the jurisdiction, because it was clearly for the infant's benefit that the scheme approved by his Honour should be adopted. In the case of *The Carron Iron Company v. Macklaren* (a) it was held, that where the circumstances of the case would make it the duty of one court in this country to restrain proceedings in another court here, they will also warrant it in imposing similar restraint with regard to proceedings in a foreign court. In that case, Lord St. Leonards was clearly of opinion (b) that this Court had jurisdiction, and referred to the case of *Kennedy v. Cassilis*, decided by Sir John Leach.

[*Innes v. Mitchell* (c) was also referred to.]

Mr. *Malins* appeared for General Stuart, and submitted to such order as this Court might make.

Mr. *Hobhouse*, for the tutor dative, contended that that gentleman had not interfered in respect of the English property, with which he had nothing to do. That Col. Crichton Stuart, as tutor dative, had duties to perform as regarded the infant and the Scotch property, for which he was responsible to the Scotch court, and which that court, even if he were willing to do so, would not allow him to abandon. The Court of Session had the sole right and duty of taking charge of the infant's person and of the property in Scotland, over the latter of which the Court of Chancery had no jurisdiction.

In *Kennedy v. The Earl of Cassillis* (d), Lord Eldon dissolved an injunction which had been granted to restrain legal proceedings in the Scotch courts. In

(a) 5 Ho. Lds. Ca. 416.

(b) Ibid. 453.

(c) 1 De G. & J. 423.

(d) 2 Swanst. 313.

Jones v. Geddes (a), Lord Lyndhurst dissolved an injunction which had been granted against continuing certain proceedings in the Court of Session in Scotland.

In *Pennell v. Roy* (b), the Lords Justices held the Court had no jurisdiction to restrain a creditor of an English bankrupt (who had not proved) from proceeding in Scotland against the real estate of the bankrupt. It was submitted, therefore, that this Court had no jurisdiction to make the order asked.

Mr. *Bacon* was heard in reply.

His Honour reserved judgment.

THE VICE-CHANCELLOR:—

What is now to be disposed of is an application on behalf of the plaintiff, a ward of this Court, to restrain proceedings in the Court of Session in Scotland touching his guardianship.

Before deciding the question, my wish was to read attentively the proceedings which are sought to be stayed. Having now read the papers, there remains in my mind no doubt as to the propriety of granting the injunction. By ordering the defendant Colonel Crichton Stuart to desist from those proceedings till the further order of this Court, it seems to me that the interest of the infant plaintiff will be benefited; and the Court of Session in Scotland will be, I hope, relieved from a great embarrassment.

In this, as in all other cases relating to the care of the person and estate of an infant who is a ward of this Court, what is principally to be considered is the benefit of the infant. Wherever it appears to the satisfaction of the Court that the interests of the infant will be advanced by any proceedings in this or in any other court, foreign or domestic, it is the duty of the Court to direct, and, as

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(a) 1 Phill. 724.

(b) 3 De G. M. & G. 126.

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far as it can, to assist in such proceedings. The litigation in Scotland has originated in the order of this Court of the 6th of July last. By that order, this Court, with a view to the benefit of the infant, directed the lady who was removed from the guardianship to deliver the infant into the care and custody of the guardian appointed by this Court; and the guardian was authorised to take all necessary steps, according to the law of Scotland, for having the infant plaintiff delivered up to him.

When this order was pronounced, it was not contemplated or intended that the steps which it authorised to be taken in Scotland should be a contentious litigation. There was no previous proceeding in the Scotch court with which it could conflict. If it were not for what appears to have been done in the unfortunate litigation now proceeding in Scotland, I should have thought it a matter of course that, in a summary way, on an affidavit verifying the order (if, indeed, any evidence was necessary, when the authenticity of the order was admitted by the person against whom it was made), the Scotch Court would at once have pronounced a decree conformable to the order of this Court, and would have entirely adopted that order, so as that it should immediately be enforced by execution, according to the law of Scotland.

The unexpected result has been a contentious and expensive litigation, from which it is impossible to see any possible benefit to the infant, who is no doubt expected to be saddled with the heavy expenses which it must occasion. The Court of Session, by refusing its aid to enforce the order of this Court, permitted the infant to continue in the custody of the lady who was for the best reasons removed by this Court from the guardianship, and ordered by this Court to deliver the infant to his proper guardian. It now appears that this lady, thus permitted to retain the custody of the infant in Scotland, went on to conduct herself and manage the infant in the same

unsatisfactory way which was to be expected from her previous conduct. This unfortunate situation of the infant attracted from other persons in Scotland that consideration for his welfare and comfort which it appears the Court of Session thought the law of Scotland and the dignity of that court prevented it from bestowing. Without any assistance from the Court of Session, further than by its subsequently sanctioning the arrangement, the infant was, during the vacation of that court, and on the natural impulse of the good sense and kind feeling of his guardian and of the Earl of Galloway, rescued from the custody of this lady, and placed where he now is, under the sanction of this Court, and with the concurrence of his guardian, under the kind and friendly care of the Earl of Galloway. That object, of such urgent importance for the welfare and comfort of the infant, was effected without the aid of the Scotch court.

All this shows plainly enough that, so far as the well-being and comfort of the infant Marquess of Bute are concerned, there has been an unfortunate miscarriage in the Scotch proceedings. It is needless to trace the course of these proceedings further, except to consider whether any and what benefit is likely to accrue to the infant from their continuance. Long before that litigation commenced, this Court, under a peaceable administration of its own jurisdiction, had approved a scheme for the residence and education of the infant. But, by the order of the Court of Session, this scheme is wholly superseded and another substituted. This direct conflict of jurisdiction can hardly be for the benefit of the infant. The better opinion seems to be, that the Court of Session has no power to alter, vary, or discharge any order of this Court made under the jurisdiction of the Great Seal of Great Britain, which is as much the Great Seal of Scotland as of England.

It is not the province of this Court to say whether,

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according to the law of Scotland, the Scotch courts are incapable of recognising or enforcing the orders of this Court made under the authority of the Great Seal, or have power to annul or disregard such orders, This Court has sanctioned an appeal to the House of Lords, which, under its supreme jurisdiction, will settle that question. If, on the result of that appeal, the Scotch orders are affirmed, this Court can have no difficulty in assisting to give effect to them, so far as necessary, for the benefit of the infant, and can put matters in a state of as much, or greater forwardness, to assist the Scotch jurisdiction than if all the expensive, harassing, and unseemly litigation were in the mean time allowed to proceed. On the other hand, if, as is not improbable, the House of Lords should decide that there has been a miscarriage in the Scotch court, and shall reverse its orders, it cannot possibly be for the benefit of the infant that there shall be in the mean time a continuance of a litigation which in that event will prove to have been erroneous, troublesome, expensive, and worse than useless.

A conflict of jurisdiction in any case is an evil, but in a matter so important and delicate as the guardianship of infants, such a conflict is a calamity. It is the duty of this Court to prevent such an evil. In proportion as the power of this Court, exercised under the Great Seal, is enormous, so it is the habit and duty of its judges to be cautious and careful in its exercise. The system on which this Court manages the affairs of infants is a benign and kindly influence. It prevents, and where it cannot prevent, it moderates and soothes all angry disputations. The property of infants is never more unrighteously squandered than in prosecuting angry quarrels as to guardianship. The great object is the benefit of its wards, and this Court knows no jealousy on matters of jurisdiction which can interfere with the paramount duty of

securing every benefit which its wards can obtain from any other quarter.

Between an English jurisdiction and a Scotch jurisdiction, where the courts of both countries sit under the authority of the same sovereign of the United Kingdom, it is of essential importance that a harmonious action should prevail, and that all conflict of jurisdiction should be avoided. What seems extraordinary in this case, and what has not been satisfactorily accounted for, is, that the defendant Colonel Crichton Stuart, whose name appears as active litigant in the Scotch court, seems to be a reluctant and helpless actor in these proceedings. All the orders of this Court were and still are approved by him. His counsel on this occasion are instructed to say, and have properly said, that he has lent his assistance to carry the order of this Court into effect. But, at the same time, he is advised that he must claim to be allowed to proceed with a litigation in Scotland in defiance of the orders of this Court, the orders of which he believes to be for the benefit of the infant, but which his Scotch advisers tell him it is his duty to endeavour to set aside by proceedings in the Scotch court.

I cannot doubt that it is the duty of this Court to interfere, by its injunction, to relieve him in this state of perplexity, and to restrain him and his advisers in Scotland from further litigation pending the appeal to the House of Lords. This Court cannot permit itself to doubt that the Scotch court, and those who are acting in these proceedings in Scotland, will recognise the order which I propose now to make. The purpose of that order is to restrain an indecorous conflict. It is inconsistent with the dignity of this Court, which acts under the authority of the Great Seal, to exercise its powers for any other purpose than to forbid a continuance of such a contest till the supreme power of the House of Lords shall have settled the question.

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Lord Eldon, in the case of *Kennedy v. Earl of Cassilis* (a), said, with reference to cases of this kind, "It will be difficult to do justice unless the courts in England aid the courts in Scotland, and the courts in Scotland aid the courts in England." Every enlightened lawyer will concur in the wisdom of this benignant view, which forbids the continuance of a mischievous conflict.

This Court always entertains, as it is bound to entertain, a tender respect for the authority of the Court of Session. Its judges are men whose distinguished learning and ability, whose characters, shed a lustre on their country; and they have in this matter, no doubt, done their best to administer the system of law which it is their duty to uphold. This Court, on an application like the present, ought not to withhold whatever assistance it can give to maintain the dignity and utility of that court, by restraining the defendant in this suit from continuing, or being made an instrument to continue, to make it the arena of worse than useless contention. On that principle it is, that I cannot refuse the present application to restrain the defendant Colonel Crichton Stuart, and still more his advisers and agents, from continuing the contest in Scotland, where the nominally contending parties have really no adverse interests.

As the real estates of the Marquess of Bute in Scotland, and his rights and interests in them, must be properly governed by the law of Scotland, it is not proper to extend the injunction to proceedings regarding them. In other respects, the injunction must go according to the prayer of the bill till the further order of this Court.

(a) 2 Swanst. 323.

OSBORN v. BELLMAN.

1860.

Nov. 6th.

BY indenture of settlement, dated the 29th and 30th days of September, 1818, made on the marriage of George Scotchmer and Ann Aldhous, Ann Aldhous conveyed freehold and leasehold property belonging to her to the trustees of the settlement upon trust (after the solemnization of the marriage) to pay the rents to Ann Aldhous for her life, and after her death to George Scotchmer for his life; and, after the decease of the survivor, to be seised and possessed thereof, "in trust to convey, assign, and assure the same respectively; and the rents, issues, and profits which should from thenceforth become due for the same unto the child, if only one, and if more than one all and every the children of the said George Scotchmer and Ann Aldhous, who should be living at the time of the decease of such survivor, as tenants in common, as and when such of the said children or such only child, who, being a son or sons, should attain his or their age or respective ages of twenty-one years, or, being a daughter or daughters, should attain her or their age or respective ages of twenty-one or be married, whichever should first happen: Provided always, that, in case any one or more of the said children being a son or sons, should die under the age of twenty-one years without leaving any issue living at the time of his or their death or respective deaths, or, being a daughter or daughters, should die under that age and without being or having been married, then as to the original share or shares in the said premises which should belong to the child or children so dying as aforesaid, and also the share or several shares in the said hereditaments which the same child or children respectively should

By a marriage settlement, property belonging to the intended wife was conveyed to trustees upon trust (after the death of the husband and wife) for the children of the marriage in the usual way. It was then declared, that, if all the children should die, the trustees should convey the property to A. B. and C. There never was any issue of the marriage.—*Held*, that, although the language of the deed only provided for default of issue, the gift over took effect.

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take under this present provision by way of cross-limitation, in trust, to assure the same and pay the rents, issues, and profits thereof to the other or others of the same children equally between them." The deed then proceeded as follows:—"Provided also, that, in case *each of the children of the said then intended marriage, being a son, should die* under the age of twenty-one years, without leaving any issue of his body lawfully begotten living at his death, or born in due time after, or, *being a daughter or daughters, should die* under that age without being or having been married, then upon trust that they, the said, &c. (the trustees) should convey, assign, and assure the said freehold and leasehold hereditaments and premises, and pay the rents, issues, and profits thereof unto James Aldhous, Robert Aldhous, John Aldhous, Susan Wyard, Mary Aldhous, and Elizabeth Cullum in fee.

Mrs. Scotchmer died in 1854, and Mr. Scotchmer died in 1858.

There never was any issue of the marriage.

In this state of things, the question arose, whether the freehold and leasehold estates went over to the persons mentioned in the settlement, or whether (the event not having occurred upon which they were to go over) they were undisposed of so as to leave a resulting trust in Mrs. Scotchmer, in which event her heir would be entitled to the real estate and her administrator to the personal estate.

The bill was filed by some of the persons claiming under the settlement, against the trustees of the settlement, and the other parties interested, for the purpose of having the question decided.

Argument.
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Mr. *W. D. Lewis* and Mr. *J. G. Humphrey*, for the plaintiffs.

The clear intention was, that, in default of children of

the husband and wife, the gift over should take. If this had been a will, instead of a deed, it would be concluded by authority.

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[*Jones v. Westcomb*(a), *Murray v. Jones*(b), *Avelyn v. Ward*(c), *Tennant v. Heathfield*(d), *Warren v. Rudall*(e), *Mackinnon v. Sewell*(f), *Fearne's Contingent Rem.*(g), and 2 *Jarman*(h), were also referred to.]

It was submitted that the same construction ought to be applied to the language of a deed.

Mr. Bacon and Mr. Grenside, for the heir-at-law.—This is a settlement by deed, and not a will, and ought to be construed strictly. The trusts are not “executory,” and there was no room for any implication in putting a construction upon the settlement, which is not in the form of articles, but is a complete settlement: *Holliday v. Overton*(i). In that case the Master of the Rolls said, the rules applicable to the construction of a will, or other executory instrument, are not in truth applicable to the simple case of a deed executed.

[*Jervoise v. Duke of Northumberland*(k), and *Lewin on Trusts*(l), were referred to, as showing a clear distinction between executed and executory trusts.]

The right course would have been to file a bill to rectify the settlement.

Mr. Elmsley appeared for the executors of the trustees.

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| (a) Prec. in Ch. 316; Eq. Cas. Abr. 245, pl. 10. | (g) Page 510. |
| (b) 2 V. & B. 313. | (h) Cap. 50, p. 751, 3rd ed. |
| (c) 1 Ves. sen. 420. | (i) 14 Beav. 467; s. c. 15 Beav. 480. |
| (d) 21 Beav. 255. | (k) 1 J. & W. 559. |
| (e) 4 K. & J. 603. | (l) 3rd ed. p. 145. |
| (f) 2 M. & K. 202. | |

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Mr. *B. C. Chapman* appeared for the trustees of the settlement.

THE VICE-CHANCELLOR :—

Whether the instrument is executory or executed, the plain meaning of the provision is that the gift over should take effect, unless there should be children of the marriage capable of taking. In the event of there being no such children, the obvious intention is, upon the true construction of the language, that the brothers and sisters of the settlor should take. There must be a declaration accordingly.

HARDING v. HARDING.

1861.

Jan. 17th.

JOHN HARDING, by his last will and testament, dated the 21st of July, 1834, made the following disposition:—"I do give and bequeath unto my wife, Jane Harding, the sum of 3000*l.*, being a moiety of the sum of 9000*l.*, mentioned in a deed of marriage settlement, made and entered into on the 2nd day of December, in the year of our Lord, 1833, between my said wife, Jane Harding, and myself, and Frederick Morgan, clerk, and Jacob Player Sturge, land surveyor, as our respective trustees, and for which sum I now hold the bond of Charles Morgan, linen merchant, of Park Street, in the city of Bristol. And I do hereby give and bequeath unto my executrix and executor, hereinafter mentioned and appointed, the sum of 6000*l.*, being the other moiety of the sum of 9000*l.* mentioned in the aforesaid deed of marriage settlement, in trust, for the benefit of my aforesaid wife, Jane Harding. And I do hereby authorise and request my said trustees to invest the same in freehold property or approved Government securities, as they may judge best, to pay or cause to be paid, the dividends, rents, or profits arising therefrom, unto my said wife, Jane Harding, for the term of her natural life, and for which her receipt shall be their sufficient discharge; but at the decease of my said wife, Jane Harding, I do hereby give and bequeath the aforesaid sum of 6000*l.* (with the dividends, rents, or profits accruing therefrom, during their minority), unto any child or children which I may hereafter have by my aforesaid wife, Jane Harding, and if more than one, then share and share alike, but if only one, then to that one, as they may respectively attain the age of twenty-one

Real estate, devised to trustees with a power of sale, and sold in an administration suit—*Held*, liable to legacy duty.

Where the Court ordered the testator's real estate, out of which his widow was dowerable, to be sold free from dower—*Held*, that succession duty was payable on the widow's dower.

Where the testator bequeathed certain monies believing that he had power to do so, but which were in fact comprised in his marriage settlement, and the legatees elected to take under the will, —*Held*, the legacy duty was payable. *Hobson v. Neale* (a).

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years; but if no such child or children should survive my wife aforesaid, then, at her decease, I do hereby give and bequeath the aforesaid sum of 6000*l.* unto my dear mother, Ann Harding, of St. Michael's Hill, in the city of Bristol, unto her heirs, executors or administrators."

The testator, after giving a legacy of 100*l.* to one Sophia Cole, absolutely, and an annuity of 100*l.* to her for her life, nominated and appointed his mother, the said Ann Harding, to be his executrix, and his uncle, Richard Taylor, to be his executor; and, after giving to his said uncle a legacy of 100*l.*, gave and bequeathed as follows, that is to say, "and whatsoever other land, messuages, tenements, and hereditaments, or property of any kind whatsoever that I may die possessed of (after the payment of my just and lawful debts, and the bequests and hereditaments mentioned), I do hereby give and bequeath unto my aforesaid executrix and executor, Ann Harding and Richard Taylor, in trust, for the benefit of any child or children which I may have by my aforesaid wife, Jane Harding, to be paid unto any such child or children, with the dividends, rents, or profits thereon accruing, in equal shares, as they, my said child or children, respectively attain the age of twenty-one years, and if only one, then to that one.

"And I do hereby authorise the trustees aforesaid to sell such of the lands, messuages, tenements, or hereditaments hereinbefore mentioned, as they may see fit, and to invest the monies arising from the same, in any way which may appear unto them best; and I do further authorise the said trustees to pay, from time to time, such sums as they may think right, for the proper maintenance and education of any child or children aforesaid."

The testator died on the 11th of June, 1851, possessed of considerable real estate, and without having altered his

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will, which was proved by his mother, Ann Harding and Richard Taylor. On the 6th of August, 1851, a decree was made directing certain accounts and inquiries, and among others, whether the testator's widow was dowable. On the 20th of June, 1855, the master made his report, whereby, among other things, he found that the testator's widow was dowable out of certain parts of his real estate, mentioned in the fourth schedule. The sum of 3000*l.* given by the testator's will, was found to be part of a fund comprised in the marriage settlement of the testator and his widow, and not within the power of the testator.

By an order, made on the 23rd of June, 1855, it was ordered, *inter alia*, that, the widow electing to take under the will, and to waive all right to the sum of 9000*l.*, certain sums should be paid into court. And it was further ordered that the amount due to the widow, if dower should be certified to be due to her, should be paid to her out of dividends to accrue on the sum of 135,300*l.* Consols. And it was further ordered that the receiver should pay one-third of the rents of the real estates comprised in the fourth schedule. Under this order the sum of 6611*l.* 11*s.* 5*d.* was carried over to the account of the legacy of 6000*l.*

On the 4th of April, 1856, letters of administration of the will of Ann Harding were granted to the petitioner. By an order, dated the 13th of January, 1857, 3000*l.* was allowed to the defendant, Jane Harding, in full of all claims for past maintenance. The legacy duty was not paid on the sum of 6611*l.* 11*s.* 5*d.*

Jane Harding died on the 31st of March, 1860, having appointed Charles Morgan her executor.

The said sum of 6611*l.* 11*s.* 5*d.* was ordered to be sold.

By an order dated 20th of July, 1860, it was ordered that 845*l.* 1*s.* 6*d.* should be raised out of a sum of 8456*l.* 19*s.* 9*d.*, as the amount due to Jane Harding for

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her dowry, down to the day of her death. The money was accordingly raised. On the 28th of August, 1860, the petitioner received the following letter:—

“ Inland Revenue Office, London, W.C.,

“ Legacy and Succession Duty Department,

“ 24th of August, 1860.

“ Sir,—The legacy duty not being paid under the will of the late John Harding for the following gift, namely, on the proceeds of sale of the real estate, and 6000*l.* bequeathed to the testator's children at the decease of his widow, I have to urge your earliest attention to the payment.

“ I am, sir, your obedient servant,

“ C. TREVOR,

“ Controller.”

On the 4th of October, the plaintiff's solicitor wrote the following reply:—

“ Shannor Court, Bristol, 4th October, 1860.

“ *Re* John Harding and Jane Harding.

“ Sir,—I understand from my agents, Messrs. Tatham & Procter, that you still claim succession duty in respect of the dower of Jane Harding, the widow of the testator, John Harding. I shall be much obliged if you will favour me with the grounds upon which the claim is made. The widow, previously to her death, sold her dower—the purchase-money for which (845*l.* 1*s.* 6*d.*) is brought into the account of her estate—and has paid legacy duty. To charge succession duty would be to make the parties interested pay double duty, viz., succession as well as legacy duty. My object in asking for explanations as to the grounds of the claim is, that if it be persisted in, I may obtain the opinion of counsel. I will thank you also to say, whom you consider liable to

the payment of the duty claimed? Will you please also to inform me whether the claim for legacy duty on the pretended legacy of 6000*l.*, under the will of John Harding, is abandoned? I shall be glad to have the copy settlement which I sent you on the 7th instant, and which you said you would return.

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" I am your obedient servant,

" WILLIAM TANNER."

" Inland Revenue Office, London, W.C.,

" Legacy and Succession Duty Department,

" 5th of October, 1860.

" Sir,—I beg to return the copy settlement, dated the 2nd of December, 1833, and to acquaint you that, upon the death (31st of March last) of Mrs. Jane Harding, duty became chargeable under the provisions of the 16 & 17 Vic. c. 51, on the 9000*l.*, subject to the trusts of the settlement for which the proper accounts required by the 45th section should be delivered.

" I am, &c.,

" CHARLES TREVOR.

" William Tanner, Esq."

" Shannor Court, Bristol, 8th of October, 1860.

" *Re* John Harding and Jane Harding.

" Sir,—I have to thank you for your favour of the 5th, returning the copy settlement of the 2nd of December, 1833; the parties desired to be advised by their counsel upon the claim now made for succession duty thereunder. I addressed a letter on the 4th instant to Mr. Walpole, respecting the claim for succession duty on account of Mrs. Harding's dower, inquiring the grounds upon which it is made, and against whom. Would you oblige me with an answer, and also whether I am to understand that, in addition to the succession duty claimed on the 9000*l.* under the settlement of the 2nd of Decem-

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ber, 1833, legacy duty is also still claimed on the 6000*l.* (part thereof), which Mr. Harding assumed a right to give as a legacy? I have as yet had no answer to my objections to the claim for legacy duty, on the sales of Mr. John Harding's real estates. May I assume that that claim is abandoned?

" I am, &c.,

" WILLIAM TANNER."

" Inland Revenue Office, London, W.C.,

" Legacy and Succession Duty Department,

" 31st October, 1860.

" Sir,—I beg to acknowledge the receipt of your letter on the 8th instant. When my letter on the 5th instant, relative to the duty chargeable on the death of the late Jane Harding, was written, your letter on the 4th, addressed to Mr. Walpole, had not been seen. The sale of the widow's dower since May, 1833, falls under the last provision of the 15th section of the Succession Duty Act, and subsequently there is a succession of real property of the annual value of such dower, for which the usual amount should be delivered on or before the 31st of March next. With reference to the legacy of 6000*l.*, over which the late John Harding assumed to have the right of disposition by his will, I beg to observe, that, until the amount noticed in my letter of the 5th instant shall have been delivered, I am unable to offer any further opinion. Your statement received with your letter on the 3rd ultimo, relative to the real estate devised by John Harding's will, has also been noted in the books of the office.

" I am, &c.,

" CHARLES TREVOR."

By an order, dated 7th of May, 1858, it was ordered that the real estates, subject to the trusts of the will,

should vest in Charles Morgan and John M'Arthur as trustees; and it was ordered that they should be sold and a value put on the dower, which was carried into effect, and sold shortly afterwards to different persons for the sum of 8140*l*. The sales were carried into effect in the ordinary way in which sales under the order of the Court are effected.

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Mr. *Malins* and Mr. *Freeling* contended that the true criterion was, whether the language of the testator amounted to a direction to sell, and so of itself converted the realty into personalty, or whether it merely invested the trustees with discretionary power to sell for the purpose of satisfying debts: *Williamson v. The Advocate-General*(*a*). In the former case it was admitted that legacy duty was payable, but in the latter case it was not. This case was within the principle of the decision in *Re Evans*(*b*), in which the Court held that a mere power to the trustees, as here, did not make the duty payable. In *Hobson v. Neale*(*c*), the Court held, that if the Court acted on the devise in the will, the duty was payable, not otherwise, or where the Court directed the land to be sold in the ordinary way.

Argument.
—

In the case of *The Advocate-General v. Smith*(*d*), it was held that the case of *Re Evans* had not been overruled, but that the rule laid down there was still law.

Mr. *Jessell* appeared for other parties, but was not heard.

Mr. *Hobhouse* appeared for one of the purchasers.

THE VICE-CHANCELLOR:—

The case of *Hobson v. Neale* governs this case. Where a Judgment.

(*a*) 10 Cl. & F. 1.

(*c*) 8 Ex. 368.

(*b*) 2 C. M. & R. 207.

(*d*) Macq. 760.

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testator directs his property to be sold, or where it is sold under a power authorising such sale, the legacy duty is payable.

Where it is sold not in pursuance of the direction or of the authority given by the testator, but by the Court, the legacy duty is not payable. Here, the sale was ordered by the Court, in consequence of the directions in the testator's will, and therefore the case is within the principle of the decision in *Hobson v. Neale*(a).

The succession duty is clearly payable on the dower.



Feb. 10th.

PONSFORD *v.* HANKEY AND HARRISON.

Demurrer to a bill by a debtor who had sold certain messages to his creditors as a security for the debt, but reserving a right of re-purchase within a stipulated term, alleging that, though previously requested to furnish an account, the defendant failed to do so till the morning of the last day of the term, when he rendered an insufficient account — Overruled with costs.

IN this case both defendants demurred.

The bill alleged that the plaintiff was a partner in the firm of White, Ponsford, & Co., and was engaged in large building transactions in Paddington and Marylebone. That, in July, 1853, the defendant Hankey advanced two sums, of 21,500*l.* and 3,500*l.*, to the firm, for which the plaintiff and his co-partners severally executed bonds to secure 25,000*l.*, with interest at 5 per cent. That the defendant had the option of nominating his son or others partners; but he never exercised it. That various changes took place in the firm; but that, prior to February, 1856, the plaintiff and a Mr. Hartley represented the firm. That in and prior to February, 1856, the plaintiff possessed certain freehold and leasehold land and premises, held either in fee simple or for long terms of years, at

(a) See the certificate of the judges, 8 Ex. 375.

Paddington, subject to the payment of certain ground-rents. That, prior to February, 1856, he had erected valuable buildings thereon, and expended large sums of money; and, in order to enable him to make such expenditure, he had borrowed large sums of money on mortgage; and, though the property far exceeded the charges thereon, he was, in the early part of 1856, wholly unable, on a sudden emergency, to command a large sum of money. That his circumstances were then well known to the defendants; and that such defendants acted on their knowledge of the plaintiff's pecuniary position, and induced or compelled him to enter into arrangements and to execute instruments, which, had the plaintiff been a free agent and unfettered in his circumstances, he would not have entered into or executed.

That, at the close of 1855, the defendant Hankey suddenly demanded immediate payment of the 25,000*l.*, and of all interest due thereon, and threatened that—(he refused to allow the plaintiff gradually to pay the debt)—unless the whole sum were paid, with interest, the defendant Hankey would be compelled to make the plaintiff a bankrupt. The defendant Harrison was Hankey's solicitor, to whom the plaintiff made several proposals for payment, the first of which was, "To sell Mr. Hankey some of my houses, say fourteen years' purchase, at the present rental; and that I shall be at liberty to re-purchase any one, or the whole of them, at any time within five years, at the same price, on payment to him of the amount of his advance to the firm of Hankey, Ponsford, & Co., with interest at 5 per cent. per annum."

That considerable correspondence passed between the plaintiff and the defendants, as to whether the proposal should be effected; but it was agreed that if, prior to the 25th December, 1860, any part of the property should be sold by the defendant Hankey, the purchase-mones should be applied in part discharge of his debt. It was

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also agreed that Hankey should receive the rents and profits of such hereditaments, to be applied, in the first place, in payment of costs, charges, and expenses attending receipt of such rent, and of rates and taxes; in the next place, in paying interest on the sum of 25,000*l.*; and lastly, in gradually liquidating the capital sum.

Prior to the 9th of February, 1856, the plaintiff gave the defendant F. Hankey a list of certain messuages; which, being approved, it was arranged that deeds should be executed, assigning such property to Hankey; and to enable him to deal with them, they were to be, on the face of them, absolute assignments, though, in fact, subject to the plaintiff's right to re-purchase, &c.

That, throughout the transactions resulting in the assignment of the premises and the articles of agreement, the defendant Harrison, who had for many years been the confidential solicitor of the plaintiff, acted as Hankey's solicitor; but the defendant, being anxious to obtain, and having in fact obtained, for himself large pecuniary advantages and benefits by virtue of the arrangements between the plaintiff and Hankey, paid greater attention to Hankey's interest than to those of the plaintiff.

The bill alleged that the plaintiff required that there should be an agreement relative to the sale of the houses, and of the understanding that the plaintiff was to have the power to re-purchase the whole or any part of the houses, within the period of five years, at the price at which he sold them, with interest at 5 per cent. That the suggestion was acceded to, and an agreement prepared and sent to the plaintiff, to which he proposed certain alterations, to the effect that if the plaintiff should re-purchase the hereditaments, Hankey should receive only his principal and interest, and should account for all receipts from sales and rents; that the plaintiff was prepared to make such additions to the agreement on the following day, at the office of the said defendant Harrison. That the

plaintiff, on the 9th of February, 1856, attended at Harrison's office, and proposed to make the alterations, but was then informed that the deeds were engrossed, as well as the various deeds; and the defendant Harrison peremptorily stated to the plaintiff that the agreement must be executed as engrossed, and without any alterations therein or additions thereto, or otherwise that the defendant Hankey would at once take proceedings against the plaintiff to enforce the immediate payment of his debt, which would probably be the cause of the utter ruin of the plaintiff. The plaintiff remonstrated against the harshness of the measures adopted towards him, and insisted that the agreement was not in accordance with the understanding that, in the event of the plaintiff re-purchasing the property, the defendant Hankey should only be entitled to the principal and interest, and declined to execute it; but the defendant Harrison refused to alter it; and the plaintiff without any professional assistance was compelled to execute the agreement, and the fifteen indentures—which were not read over to him. That the plaintiff executed the said agreement, and the indentures, under pressure; and did not give up or waive any part of the understanding as to the terms of re-purchasing; and stated that he would at all times insist on such right. The agreement bore date the 9th of February, between Hankey of the one part, and the plaintiff of the other; and, after reciting the circumstances of the loan of 25,000*l.*, the application for repayment, and that the plaintiff was to have the option of re-purchase, the parties agreed (briefly) as follows:—

“ First. That it shall be lawful for the said James Ponsford, his executors, &c., on the 25th of December, 1860, or at any time prior thereto, on giving to the said Hankey, his executors, &c., three calendar months' previous notice of his intention so to do, by leaving such notice at the abode of the said Hankey, his executors, &c., to re-purchase the property comprised in the schedule

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thereto, and so conveyed to the said Hankey, his executors, &c., subject to the mortgage then affecting the same, upon payment to him of 25,829*l.* 2*s.* 4*d.*, and interest at 5 per cent. per annum, from the quarterly day of payment of rents in London, next preceding such payment, in case the same shall not be made, or any of the said quarterly payment days of rents, or of so much thereof as shall then be due, after deducting the net proceeds of all sales (if any) which shall have been previously made, including all monies laid out in repairs or improvements of the property, in pursuance of the power therein contained; and that the said Hankey, his executors, &c., shall, upon receiving the amount of the monies aforesaid, at the cost of Ponsford, his executors, &c., re-assign or re-convey to him, or as he shall direct, all the said property, or so much thereof as shall not then have been previously sold or disposed of, for the residue of the term of years therein, subject to the rents and covenants, and also subject to the mortgage debts and incumbrances charged thereon respectively, but freed and absolutely discharged from all claims and interest of the said Hankey, his executors, &c., to or upon the same property respectively.

“Second. That time shall be considered as of the essence of the aforesaid permission to re-purchase, and that the right of re-purchase hereby agreed to be given shall, in no case, and under no circumstance, be exercisable after the 25th of December, 1860, any rule of law or equity to the contrary notwithstanding; and that the arrangement effected by the indenture of even date with these presents shall not be considered as constituting a mortgage, but an absolute purchase by the said Hankey, with such limited right of re-purchase only as is hereby expressly given. And, further, that such right of re-purchase shall not preclude or prevent the said Hankey, his executors, administrators, or assigns from letting, selling, or otherwise managing or dealing with the said property, or from doing the repairs thereof as he shall

think proper, and without being liable to take the opinion of the said Ponsford, his executors, &c., in relation thereto: and that so long as the right of the said Ponsford, his executors, &c., to re-purchase the said premises shall continue exercisable according to the provisions of this agreement, it shall be lawful for the said Hankey, his executors, &c., to retain and have the possession, management, and enjoyment of the said premises, and to receive the rents and profits thereof for his or their own absolute use and benefit, without any interruption by the said Ponsford, his executors, &c.; all which said rents and profits, up to the time of re-purchase thereof as aforesaid, or to the quarter day of payment immediately preceding the same, in case the same shall not be re-purchased on any of the usual days of payment of rent in the year, shall belong to and become the absolute property of him, the said Thomas Alers Hankey, his executors, administrators, or assigns; and also that it shall be lawful for the said Hankey, his executors, &c., during the time aforesaid, and at any time prior to the re-purchase of the said premises, in pursuance of the powers hereinbefore contained in that behalf, to demise all or any part of the said premises for any term or terms of years whatsoever as he shall think proper.

“Third. That so long as the aforesaid right to re-purchase shall continue exercisable as aforesaid, it shall be lawful for the said Hankey, his executors, &c., to sell all or any part or parts of the aforesaid premises, either by public sale, &c., and on such terms generally as he shall think proper, and without being accountable to any liability to consult with the said James Ponsford, his executors, &c., thereon. And that the said Ponsford, his executors, &c., shall, if required, at the expense of the said Hankey, his executors, &c., join and concur in all proper assignments to the purchaser or purchasers for carrying into effect any sale or sales to be made as aforesaid; all the

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consideration monies for each such sale or sales, after payment of the mortgage debt or debts charged upon the property sold, or a proportionate part thereof, in the event of its not including the whole of the property comprised in such mortgage, all the incidental expenses, and the amount of all monies paid or expended by the said Hankey, his executors, &c., for repairs or improvements of the property as aforesaid, being paid over to the said Hankey, his executors, &c., for his own benefit; but yet so that, after receipt thereof, the aforesaid right of re-purchase shall be exercisable in respect of the property for the time being remaining unsold, on payment by the said Ponsford, his executors, &c., unto the said Hankey, his executors, &c., of such a sum of money as together with the net amount so received shall make up the aforesaid sum of 25,829*l.* 2*s.* 4*d.*; and on the observance by him of the other terms and stipulations which on his or their part ought to be observed, in order to entitle him or them to re-purchase the said premises according to the spirit and intention of the aforesaid provisions in that behalf.

“Fourth. That, if any of the debts or incumbrances specified in the said schedule to those presents shall be paid off whilst the aforesaid right to re-purchase shall continue, or whilst the premises subject to such mortgage or incumbrances shall continue subject to such right, the person by whom the same shall be paid off, whether it be the said Hankey, his executors, &c., or the said Ponsford, his executors, &c., shall, as between the said parties hereto, and his or their respective representatives and assigns, be considered as standing in the place of the mortgagee or incumbrancer whose debt or incumbrance shall be paid off.

“Fifth. That he the said Hankey, his executors, &c., shall, whenever thereunto required by the said James Ponsford, his executors, &c., release and assign to the said Ponsford,

his executors, &c., or otherwise, as he or they shall direct, his aforesaid debt of 25,000*l.*; and that the same and other deeds and instruments necessary for effectuating the above-mentioned purposes shall be made and entered into by the parties aforesaid, and shall be prepared and executed at the said Ponsford's expense: as by the said agreement, to which the plaintiff craves leave to refer when produced, will appear."

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Appended to the agreement was a schedule containing a list of the property.

The bill alleged that the plaintiff executed the agreement under pressure; that immediately on the execution of the agreement he took possession of the property; that he had sold a large portion of the property and received the purchase-monies, and also since the agreement received the rents of the unsold property. That the total amounts received by Hankey or Harrison in respect of such sales, rents, issues, and profits amount to a very large sum, more than sufficient, or very nearly sufficient, to pay the whole of the principal sum of 25,000*l.*, with interest at 5 per cent. since the date of the agreement, together with all costs, charges, and expenses incurred by Hankey in respect of the said hereditaments, &c.

On the 22nd of September, 1860, the plaintiff gave notice, in pursuance of the memorandum, of his intention to re-purchase on or before the 25th day of December next, and further gave notice as follows:—

"And further, I do hereby give you notice that I do and shall require of and demand from you a true and correct detailed statement of all the rents and profits which you have received for each respective property, house, and premises, together with all the interest monies, income-tax, and ground-rents which you have paid in respect to such property, houses, and premises comprised or referred to in the aforesaid agreement or

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schedule thereto, and income-tax you have received during each respective quarter of the year of five years, commencing from the 25th day of December, 1855, up to and during and to the full end of the term, which you have received, and may receive, rents and profits for each respective property, house, and premises. And I require of you to deliver to me on or before the 21st day of October next, such detailed particulars as aforesaid, of rents received, income-tax received by you, and income-tax paid or allowed by you, and ground-rents paid in respect of the aforesaid property, houses, and premises. As witness my hand,

“JAMES PONSFORD.”

That on the 25th of September, 1860, the defendant Hankey acknowledged the receipt of such notice, and promised to furnish such account as Harrison should advise; but by a second letter, dated the 13th of October, he declined to furnish such account. The plaintiff again wrote, demanding such account, and on the 18th of December, 1860, Harrison wrote disputing the plaintiff's right to an account of the rents.

The bill then alleged that the plaintiff, being unable to ascertain the exact amount due to the defendant Hankey, on the 22nd of December, 1860, served a notice on the defendant Hankey, and on his solicitor Harrison, requiring by twelve o'clock on Monday, the 24th of December, 1860, an account of all sums of money received in respect of rents, issues, and profits of the messuages, and an account of all sums received on sales of the hereditaments sold, showing dates of sales, gross amount of purchase-monies received, and the purchasers thereof. The notice further stated, that if the defendant declined to give the first account required, the plaintiff yet required the second account, and was ready and offered to pay on the 24th of December, by three o'clock,

such sum as was due in respect of the principal and interest due according to the agreement and the understanding of the parties at the time. The notice further stated, that unless such account as was secondly required were given, the plaintiff would file his bill to obtain a re-assignment of the unsold property, and an injunction to prevent the sale thereof.

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The bill alleged, that on the morning of the 24th of December, 1860, the defendant Harrison, acting for the defendant Hankey, sent to the plaintiff's solicitor an account of the sales, &c., which deducted large sums from the amount received, and purported to show a balance of 16,475*l.* 6*s.* 3*d.* still due to Hankey. The bill alleged, "that the said account is insufficient and unsatisfactory, and does not contain a true and just account of the sale made by the defendant Hankey, or of the sums received by him in respect thereof, and does not show the balance which, having regard to the sales made by the defendant Hankey, would be really due from the plaintiff to the defendant Hankey." The said account did not profess to give an account of the rents.

The plaintiff charged that the defendant Hankey was bound, within a reasonable time after the 22nd of September, 1860, to furnish the accounts required in the notice of the 22nd of December, 1860 (*a*); or at all events, that he was bound within a reasonable time after the 22nd of September, 1860, to furnish the several accounts thereby required. The plaintiff charged that, under the circumstances, the plaintiff's right to re-purchase will still continue in force, even if the re-purchase of the hereditaments should not be completed by the 25th of December, 1860.

The bill alleged that the defendant Harrison, under divers agreements, deeds, and assurances, the particulars of which were wholly unknown to the plaintiff, and by

(*a*) This is probably a misprint for September.

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virtue of some verbal understanding and agreement with the said Hankey, the particulars of which verbal agreement were wholly unknown to the plaintiff, claimed to be and was interested in the said messuages, lands, tenements, and hereditaments; and he alleged he was and was in fact a necessary party to this suit.

The bill averred that the plaintiff was entitled to the accounts specified in the notice of the 22nd of December, 1860, and was entitled to re-purchase the messuages on payment of the balance due, and was entitled to the full benefit of the stipulations to re-purchase, even if the re-purchase be not completed on or before the 25th of December, 1860.

The bill then prayed:—

1st. A declaration that the plaintiff was entitled against the defendant Hankey, and all persons claiming under him, to the benefit of the stipulations to re-purchase.

2nd. An account of the rents and profits.

3rd. An inquiry as to the hereditaments sold, and the gross amount of the purchase-mones, &c., &c.

4th. An account of what was due to Hankey for principal and interest, and in taking such account that Hankey should be directed to account for rents and profits, and in respect of the gross proceeds of the sales.

5th. A declaration that the plaintiff was entitled to re-purchase the unsold hereditaments, and that the defendant Hankey and all necessary parties might be directed to execute the necessary deeds, &c.

Argument.
 —

Mr. *Bacon* and Mr. *Cotton*, for the defendant Hankey, contended that there was no equity disclosed on this bill. The agreement was, that the defendant Hankey was to be the purchaser of the property, reserving a right of re-purchase. The plaintiff treated the transaction as a mortgage, and asked relief on that footing; but it was clear that the sale was absolute, subject to the right to

re-purchase on or before a particular day. Time was here the very essence of the contract, and the plaintiff, to entitle himself to the right of re-purchase after the date fixed, ought to have made a tender, which he never did, and indeed had not offered in clear terms to pay what was due.

The notice did not operate as a tender, nor did the filing of a bill. This was not a case of forfeiture or penalty, but a privilege of re-purchase, reserved at a stated period on payment of sums of money; if the money is not paid to the day, the privilege is lost: *Davis v. Thomas* (a). The same principle was recognised in *Pegg v. Wisden* (b), though the facts there did not admit of its application with regard to the question of an account of the rents. [*Birch v. Joy* (c) was also cited.]

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Mr. *Elmsley* and Mr. *Jessell*, for the defendant Harrison, submitted that there was no relief prayed against Harrison; that he was a mere agent, and as such, not a proper party: *Le Texier v. The Margrave of Anspach* (d). There was, no doubt, the general charge, that the defendant claimed an interest in the matters in question in the suit, but that was insufficient to avoid a demurrer: *Plumb v. Plumb* (e).

Mr. *Malins* and Mr. *H. F. Bristowe* appeared for the plaintiff.

THE VICE-CHANCELLOR:—

It is impossible to adjust the matters in dispute between the plaintiff and the defendant Hankey without having an account taken. But, further, the allegations of the bill, which must for the purpose of the demurrer be taken to be true, impute oppressive and unjust conduct to the

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(a) 1 Russ. & M. 506.

(d) 5 Ves. 322.

(b) 16 Beav. 239.

(e) 4 Y. & C. 345.

(c) 3 Ho. Lds. Ca. 565.

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defendant Hankey. It is clear, therefore, that the demurrer by the defendant Hankey must be overruled in the usual way.

But with regard to the defendant Harrison, the bill shows that he acted as Hankey's solicitor and agent, and as such, ought not to be a party to the suit. There is, however, a vague charge that he has an interest in the matters in question, but I do not think it is sufficient to avoid this demurrer. This demurrer, therefore, must be allowed.

Feb. 26th.

KNIGHT v. KNIGHT.

Shares in an Assurance Company, enclosed in an envelope and indorsed "to be considered as ready money and given to" testator's wife — *Held*, to pass under a bequest of "all sum and sums of money that might be in the house."

GEORGE KNIGHT, by his will, dated the 2nd of August, 1845, made the following disposition:—

"This is the last will and testament of me, George Knight, of Sloane Street, in the county of Middlesex, gentleman, whereby I give and bequeath unto my dear wife, Ann Knight, all that my leasehold house and premises, No. 95, Sloane Street aforesaid, with all the household furniture, books, linen, plate, liquors, horses, carriages, and articles by me in use at the time of my decease; and also all sum and sums of money that may be in my house and at my banker's, and all rents and debts and sums of money that may be due and owing to me at my decease, but not monies in the public funds or lent at interest: the same to be paid and delivered to my dear and loving wife as soon as conveniently may be after my decease, to and for her own absolute use and benefit, she paying my funeral and testamentary expenses, and such debts as I may owe at the time of my decease. And as to all my real estate, and the

residue of my personal estate and effects, I give, devise, and bequeath the same unto my brothers John Knight and James Knight, to hold to them, their heirs, executors, administrators, and assigns, according to the nature and tenure thereof, upon trust, nevertheless, to permit my dear wife to receive and take or pay to her the rents and interest, dividends, and annual produce of my said real and personal estate during her natural life, independent of any husband she may marry, so that the same may be free from his debts, engagements, and control, and that her receipt alone shall be a sufficient discharge for the same; and from and after the decease of my said dear wife, I give, devise, and bequeath all and singular my real and personal estate as follows, that is to say, to such of the children of my deceased brother William Knight, as may be living at the decease of my dear wife, 100*l.*, to be paid to them as they shall respectively attain the age of twenty-one years. My freehold estate in the county of Sussex, in the occupation of William Bowell, I give and devise unto my nephew William, son of my late brother William Knight, his heirs and assigns for ever. My one moiety or half-part of a share in the New River Company, and all my estate and interest therein, with the land-tax thereon redeemed, I give and devise unto my brother James Knight, his heirs and assigns for ever, he paying thereout unto my brother Charles Knight, the sum of 3000*l.* to whom I give the same, and to be paid within six months after the decease of my said wife, if the said Charles shall be then living. And as to all the rest and residue of my real and personal estate, whatsoever and wheresoever, which may belong to me at my decease, I give, devise, and bequeath the same unto my brother John Knight, his heirs, executors, administrators, and assigns absolutely, but subject, as to property vested in me as a trustee or mortgagee, to the equities affecting the same respectively. And I hereby appoint

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John Knight and James Knight trustees and executors of this my said will."

On the 2nd of February, 1858, the testator died; John Knight, one of the executors named, having died previously. On the 19th of May, 1858, James Knight, the other executor, renounced probate and disclaimed the trusts of the will.

On the 14th of June, 1858, letters of administration with the will annexed were granted to the widow.

On the 9th of June, 1859, this bill was filed by the next of kin of the testator, to administer his estate, and also in respect of a transaction purporting to be a sale of part of the testator's real estate, which was said to be merely a mortgage. On the 23rd of January, 1860, the usual administration decree was made, directing certain accounts and inquiries.

On the 8th of June, 1860, Mr. Hall, his Honour's chief clerk, made his certificate, which was as follows:—

"The defendant, Ann Knight, the administratrix with the will annexed, has received personal estate not specifically bequeathed to the amount of 870*l.* 14*s.* and has paid, &c. 710*l.* 5*s.*, leaving a balance due from her of 160*l.* 8*s.* 6*d.* . . . The item of disbursement No. 2 disallowed is a sum of 135*l.* 13*s.*, produced by the sale of fifty shares in the London and Provincial Law Assurance Society. The said shares were found by the defendant, Ann Knight, after the death of the testator, in a chest in which he usually kept his ready money, enclosed in an envelope, on which was indorsed the following memorandum written by the testator in ink:—

"To be considered as ready money, and given to Mrs. Knight for her use.—G. K."

If the Court should be of opinion that these shares passed under the will of the testator to Ann Knight, then the balance of 160*l.* 8*s.* 6*d.*, hereinbefore stated to be due from her, will be reduced by the said sum of

135*l.* 13*s.* to the sum of 24*l.* 15*s.* 6*d.* The evidence produced as to these shares consists of the affidavit of Ann Knight and H. T. Francis.

The question now raised was, whether the shares in the London and Provincial Law Assurance Society passed under the denomination of ready money.

Mr. Bacon and Mr. Prendergast for the plaintiff.

The evidence of what was ready money must be collected from the context of the will: *Lowe v. Thomas* (a); *Parker v. Marchant* (b); *Kendall v. Kendall* (c); *Gosden v. Dotterill* (d); *Slingsby v. Grainger* (e).

Parol evidence is not admissible, because that would be to add to the written will a nuncupative will: *Nicholls v. Osborn* (f); *Clementson v. Gandy* (g).

In this case the words were quite intelligible, and ought to receive their fair construction; but the Court would not admit extrinsic evidence to prove an intention which the will did not express, or that it was the intention of the testator to express that which his language did not express.

[*Jarman on Wills* (h) was also cited.]

Mr. Greene and Mr. L. Field appeared for the widow, but were not called on.

Mr. Malins and Mr. Rogers appeared for other parties.

THE VICE-CHANCELLOR:—

This is clearly a case in which extrinsic evidence is

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| (a) 5 De G. M. & G. 315—317;
s. c. 1 Kay, 369—377. | (f) 2 P. Wms. 419; Wigram,
93, p. 102 in the edition edited
by Mr. Knox Wigram. |
| (b) 1 Y. & C. 290, 303—305. | (g) 1 Keen, 309—316; <i>ibid.</i>
105. |
| (c) 4 Russ. 360—370. | (h) Vol. I., 3rd ed., 753. |
| (d) 1 M. & K. 56—59. | |
| (e) 7 Ho. Lds. Ca. 273—287. | |

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admissible. The extrinsic evidence proves the construction which the testator put upon his own language, and that he meant these shares to pass by the description of "ready money." There must, therefore, be a declaration that the packet of shares passed to the widow under the description of ready money.

*Feb. 15th &
 16th.*

CARTWRIGHT v. GLOVER.

Under the 145th section of the Bankrupt Consolidation Act, a bankrupt's interest in leasehold property remains in the assignees until they elect not to take the devise; therefore, where the assignees allowed the bankrupt to remain in possession of leasehold premises and pay the rent to the lessor, but afterwards sold without his knowledge —the Court held the sale valid.

THIS was a motion, on behalf of Moses Cartwright, a bankrupt, to restrain the defendants, who were his assignees in bankruptcy, from interfering with his possession of certain premises in connexion with the North Staffordshire Railway Company, to which he claimed to be entitled under a certain agreement, dated the 15th of November, 1853. By that agreement, the North Staffordshire Railway Company demised to Moses Cartwright six arches under the railway, for the term of seventeen years, from Michaelmas, 1853, with a right of way, and liberty to use a siding for the conveyance of coal, ironstone, &c., at the rent of 30*l.* for the siding, and 5*l.* for the arches. The rent to be paid quarterly,

The plaintiff carried on his business on the premises from November, 1853. In June, 1860, his stock and

Copeland v. Stephens (a) has no application where, by virtue of the Act, the bankrupt's estate vests in the assignees.

goods were seized by the sheriff under a *fi. fa.* at the suit of a creditor; but the property so seized was purchased from the sheriff by the sisters of the plaintiff, who carried on the business as agent for his sisters, from whom he received a commission.

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On the 16th of August, 1860, Moses Cartwright was adjudicated a bankrupt, and the defendant George Kinneer was appointed official assignee, and Joseph Hulse and John Harp were appointed creditors' assignees. The bankrupt remained in possession of the premises as agent for his sisters, and paid the rent due at Michaelmas, and expended some money on the premises. In the meanwhile, by an indenture between the trade assignees of the one part, and the defendant James Glover of the other, in consideration of a sum of 450*l.*, all the steam-engines, boilers, &c., machinery, tools, bricks, &c., and other goods, chattels, and effects whatsoever, "in and upon the mill and premises at Longton aforesaid, late in the occupation of the said Moses Cartwright, and which are now vested in the said Joseph Hulse and John Harp, as his assignees, and also all and every lease and leases granted by the North Staffordshire Railway Company to the said Moses Cartwright, and the full benefit and advantage thereof respectively, and of any agreement or agreements for any such lease or leases, and particularly the full benefit, use, and occupation of the shed or sheds belonging to the said railway company, situate under the railway at Longton aforesaid, and which was lately in the occupation of the said bankrupt, and all other the goods, chattels, rights, and interests vested in the said Joseph Hulse and John Harp, and connected with the mills called Anchor Mills, late in the occupation of the said bankrupt," were assigned to the defendant James Glover, &c., absolutely.

In January, 1861, James Glover took possession of the property.

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On the 18th of June, 1861, the bankrupt and his sisters filed their bill, praying for a declaration that the defendants, the assignees, had elected not to take, or at all events were in equity precluded from now electing to take, the interest of the plaintiffs, and that the plaintiffs, or some or one of them, were or was, as against the said assignees and against the said James Glover, entitled in equity to the possession and enjoyment thereof, free from interruption on the part of the assignees, or any person claiming under them, particularly the defendant Glover.

The bill also asked for an injunction on the footing of the above declaration.

The bill alleged that the assignees had never taken, or elected to take, the interest of the said Moses Cartwright under the said articles of agreement, or entered into possession of any part of the premises comprised therein, or in any manner interfered with the occupation or use of the said premises by the plaintiff Moses, or by the plaintiffs Sarah and Harriet Cartwright, although the defendants were well aware of the existence of such interests. That on the contrary, the assignees had, well knowing the facts, permitted the plaintiff Moses Cartwright to pay, and he had in fact paid to the said railway company the rent of the said premises, which had accrued due under the articles since the date of the said adjudication. That the defendant Glover had permitted the plaintiffs Sarah and Harriet Cartwright, without any claim or assertion of title on the part of the assignees, or of the said James Glover, or any one of them, to carry on the business and to make large expenditure on the premises. That the defendant Glover took the property with knowledge of all the circumstances, and particularly with notice that the assignees had not elected to take the interest of the said Moses Cartwright under the said articles of agreement.

Mr. *Malins* and Mr. *De Gex*, in support of the motion.

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Under the 145th section of the Bankrupt Consolidation Act (*a*), the legal estate, in a term of years, remained in the bankrupt, until the assignees elected to accept the lease: *Copeland v. Stephens* (*b*). In that case, the very point in dispute arose; and the Court of King's Bench held that, until the election, the term remained in the bankrupt.

In this case, the assignees had not only not done anything to show their intention of electing, but, by allowing

(*a*) CXLV. "That, if the assignees of the estate and effects of any bankrupt having or being entitled to any land, either under a conveyance to him in fee, or under an agreement for any such conveyance, subject to any perpetual yearly rent reserved by such conveyance or agreement, or having or being entitled to any lease or agreement for a lease, shall elect to take such land, or the benefit of such conveyance or agreement, or such lease or agreement for a lease, as the case may be, the bankrupt shall not be liable to pay any rent accruing after the issuing of the fiat, or filing of the petition for adjudication of bankruptcy against him, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements in any such conveyance or agreement, or lease or agreement for a lease; and if the assignees shall decline to take such land, or the benefit of such conveyance or agreement, or lease or agreement for lease,

the bankrupt shall not be liable, if, within fourteen days after he shall have had notice that the assignees have declined, he shall deliver up such conveyance or agreement, or lease or agreement for lease to the person then entitled to the rent, or having so agreed to convey or lease, as the case may be; and if the assignees shall not (upon being thereto required) elect whether they will accept or decline such land, or conveyance or agreement for conveyance, or such lease or agreement for a lease—any person entitled to such rent, or having so conveyed or agreed to convey, or leased or agreed to lease, or any person claiming under him, shall be entitled to apply to the Court; and the Court may order them to elect and deliver up such conveyance or agreement for conveyance, or lease or agreement for lease, in case they shall decline the same, and the possession of the premises, or may make such other order therein, as it shall think fit."

(*b*) 1 B. & Ald. 593.

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the bankrupt to remain in possession and to pay rent, they had given the strongest proof that they elected to decline the lease. But if so, it was clear that the term remained in Moses Cartwright as completely as if he had never been bankrupt.

In *Briggs v. Sowry* (a), under the 75th section of 6 Geo. 4, c. 16, it was held that where the assignees declined to accept the lease, which had not been delivered up to the lessor, the property in the lease was in the bankrupt.

Secondly, it was contended that the assignees, being privy to what was going on between the bankrupt and his sisters, could not afterwards assert a title in themselves: *Nicholson v. Hooper* (b), *Mangles v. Dixon* (c), where the principle was affirmed, though the decision was reversed.

Thirdly, it was contended that, as only two of the assignees had concurred, the title of the purchaser was bad. [*Tucker v. Hernaman* (d) was also referred to.]

Mr. Bacon and Mr. Cracknall appeared for the assignees and the purchaser Glover, but were not called upon by his Honour.

Judgment. THE VICE-CHANCELLOR:—

This question has been argued by a reference to decisions which are inapplicable to the present bankrupt law. The bankruptcy occurred on the 16th of August, at which time the bankrupt had this leasehold interest—an equitable interest, no doubt—but still an interest which, it is admitted, is within the 145th section of the present Bankrupt Act.

By a deed, dated the 14th of December, the assignees in

(a) 8 M. & W. 729.

(b) 4 M. & C. 179.

(c) 1 M. & G. 437; s. c. 3 Ho. Lda. Ca. 702.

(d) 1 S. & G. 394.

bankruptcy sold and assigned this leasehold interest; and upon the 3rd of January following, the purchaser from the assignees in bankruptcy entered into possession of the property. It is contended that he has not a good title. The present bill is filed by the bankrupt, asserting in himself a title to this leasehold property, adverse to the purchaser of it from his assignees; and it has been contended at the bar, that, until an election by the bankrupt's assignees, the bankrupt himself continued to be the owner of the property.

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In the month of October, after the bankruptcy, the bankrupt paid rent to the landlord. There is a conflict of evidence as to whether that payment of rent was or was not made with the knowledge of the assignees in bankruptcy. I cannot take it as proved that it was with their knowledge; but that circumstance is wholly immaterial. It does not amount to an election by the assignees not to take the lease. Moreover, the right of the bankrupt has been rested upon this, that in consequence of the acquiescence of the assignees, the bankrupt continued owner of the property until the assignees elected to take it. That proposition is not the law.

The decision in *Copeland v. Stephens* is a decision on the construction of the old Bankrupt Act. It is a leading case of very high authority, and is valuable for this, that it contains an admirable exposition of the questions that arise with reference to the legal interest, before possession has been taken, of the person to whom a demise for a term of years has been made. But Lord Ellenborough, in delivering the judgment of the Court in that case, took care to point out what it was that created the difficulty there. At page 604, Lord Ellenborough says, "An assignment by commissioners of bankrupt is the execution of a statutable power given to them for a particular purpose, viz., the payment of the bankrupt's debts. Nothing passes from them, for nothing was previously vested in them." That was the state of things

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under the old Bankrupt Act; and the inconvenience of it has occasioned an enactment by the legislature, by which that state of things no longer exists. The assignment by commissioners is a thing no longer in existence. The state of things which Lord Ellenborough adverted to—of nothing passing by assignment because nothing was previously vested in the commissioners, and considering the election by the commissioners as an execution of a power—has gone by. By the 142nd (a) section of the existing Bankrupt Act, when any person shall have been adjudged a bankrupt, all his estate and effects, present and future, become absolutely vested in the assignees for the time being. Nothing can be more clear than this. Nothing, therefore, can be more clear than that the state of things upon which the whole decision in *Copeland v. Stephens* proceeded, viz., that nothing vested until the power was exercised, is no longer applicable to the right of those who claim by assignment under assignees in bankruptcy.

(a) CXLII. "That when any person shall have been adjudged a bankrupt, all lands, tenements, and hereditaments, except copy or customary-hold, in England, Scotland, Ireland, or in any of the dominions, plantations, or colonies belonging to Her Majesty, to which any bankrupt is entitled; and all interest to which such bankrupt is entitled in any of such lands, tenements, or hereditaments, and of which he might, according to the laws of the several countries, dominions, plantations, or colonies, have disposed; and all such lands, tenements, and hereditaments as he shall purchase, or shall descend, be devised, revert to, or come to such bankrupt before he shall have obtained his certificate, and all deeds, papers, and writings respecting the same shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, by virtue of their appointment, without any deed or conveyance for that purpose; and as often as any such assignee or assignees shall die, or be lawfully removed or displaced, and a new assignee or assignees shall be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed, shall, by virtue of such appointment, vest in the new assignee or assignees, either alone or jointly with the existing assignees, as the case may require, without any conveyance for that purpose."

It is very true that, under the 145th section, the legislature deals with the right of election on the part of the assignees in bankruptcy. But Lord Ellenborough treated as settled law what Lord Kenyon had previously laid down, that the assignees in bankruptcy are not bound to take a *damnosa hereditas*. Their right is to be exercised with a view to the benefit of the creditors. Therefore, the 145th section of the Bankrupt Act gives to those assignees who have vested in them all the property of the bankrupt the right to renounce and give up the legal interest which they shall think it not for the benefit of the creditors to take; and, in order to secure to those to whom it is of importance, that the election may be made in due time, the latter part of the 145th section provides that, if the assignees should not elect whether they will accept, any person entitled to the rents of the leasehold property, or any person claiming under him, shall be entitled to apply to the Court; and the Court shall order election to be made. But no such right is reserved to the bankrupt; and yet it is argued that, till the election not to renounce but to take the legal interest is made by the assignees, notwithstanding the 142nd section, the bankrupt is the owner of the leasehold interest, and has the term of years vested in him. I have pointed out already that the old decision of *Copeland v. Stephens*, where the commissioners could only act in execution of a power, has no application to the present law. It only remains to consider that the bankruptcy occurred in August: and in September the assignees sold and conveyed to the leasehold interest: and the question is, whether the fact that the bankrupt remained in possession, and paid a quarter's rent six months after the bankruptcy, is enough to give a right to the bankrupt to exclude the right of the assignees. I am of opinion that it is not. This motion proceeds on a mistake, and must therefore be refused, but without costs.

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March 19th,
April 15th,
16th, 17th,
18th, 19th,
20th.
May 4th.

THE EMPEROR OF AUSTRIA v. DAY AND KOSSUTH.

The defendants having manufactured a large quantity of printed paper to represent the public paper-money of the kingdom of Hungary, in order to use it, when opportunity should occur, for purposes hostile to the sovereign ruling power of that kingdom—they were restrained, at the suit of the Emperor of Austria, as King of Hungary, and decreed to deliver up the paper to be cancelled, and restrained by perpetual injunction from manufacturing such paper.

The law of nations is part of the common law of England, and money being the medium of commerce, a foreign sovereign at peace with the Crown of England, suing in this Court to protect his prerogative right of issuing coin or paper money, will have his right protected from invasion.

ON the 28th of February, 1861, Sir H. Cairns, with Mr. Cotton, moved *ex parte*, on behalf of the Emperor, for an injunction that the defendants, Messrs. Day, until and at the hearing might be restrained from printing, or lithographing, or manufacturing any documents purporting to be the notes of the Hungarian state or nation, or notes with the royal arms of Hungary printed thereon; and in the mean time, and until the hearing of this cause, might be restrained by the like order and injunction from delivering to the defendant Louis Kossuth, or parting with or permitting Messrs. Day to part with or deliver to any person the plates prepared by Messrs. Day aforesaid, or any of them, or the documents printed or lithographed thereupon, or any of the documents in their possession purporting to be a note of the Hungarian state or nation, or any notes in their possession with the royal arms of Hungary printed thereon.

The bill, which was supported by an affidavit (in nearly the same terms) of Count Apponyi, alleged as follows:—

1. The plaintiff is King of Hungary, and as such, and in right of his crown, has the sole and exclusive right and privilege of authorising the issue in Hungary of notes for payment of money to be circulated in that country as money; and also the sole and exclusive privilege of authorising to be affixed to any document intended to be published or circulated in Hungary the royal arms of that country.

2. Nearly the whole of the circulation of Hungary

Court to protect his prerogative right of issuing coin or paper money, will have his right protected from invasion.

consists of notes of the National Bank of Austria, which are issued under the authority of the plaintiff, as Emperor of Austria and King of Hungary; and these notes, under the authority of the plaintiff, circulate in Hungary as money, and are for various sums of one florin and upwards each.

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4. The plaintiff has lately ascertained that Messrs. Day & Sons, who are lithographers, by the direction of Louis Kossuth, who is residing in England, have prepared plates for printing documents which purport to be notes of the Hungarian state or nation for various sums of money, and which are designed to be circulated as money in the kingdom of Hungary; and that Messrs. Day, by the direction of Louis Kossuth, are now engaged in printing, from the plates so prepared, documents which purport to be such notes as aforesaid, and called, for distinction's sake, spurious notes.

5. The body of each of such notes is in the Hungarian language, and has on the border thereof, in German and also in Slavonic and other languages, the amount for which it purports to be a note, and at the bottom a copy or print of the royal arms of Hungary. Some of these documents are for one florin each; the body of each of such one-florin notes, when translated into English, is as follows:—

ONE FLORIN.

This Monetary Note will be received in every Hungarian State and Public Pay-Office as

ONE FLORIN IN SILVER,

Three Zwanzigers being one florin; and its whole nominal value is guaranteed by the State.

In the name of the NATION,

KOSSUTH, LOUIS.

6. The said spurious notes for sums larger or smaller than one florin are, with the necessary variations of the

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amount, the same as those stated above; and the total nominal amount of the spurious notes which Messrs. Day are manufacturing will exceed one hundred millions of florins (*a*).

7. Messrs. Day & Son have in their possession a very large number of the spurious notes entirely or nearly completed, and will, unless restrained, shortly deliver to the defendant Louis Kossuth the spurious notes they are manufacturing; and the said Kossuth intends, as soon as he receives the said spurious notes, without any authority from and against the will of the plaintiff, to send the spurious notes to Hungary, and to sell some of them to such of the plaintiff's subjects and other residents as will take them, and by this and other means to introduce the same into circulation into Hungary; and he intends to use the remainder of such notes for other purposes in Hungary in violation of the rights and prerogative of the plaintiff, as king of that country, and, among other purposes, for the promotion of revolution and disorder. The plaintiff has never in any way authorised the manufacture of the said notes, or the use thereon of the royal arms of Hungary; and the introduction of the said notes into Hungary will create a spurious circulation there, and by that and other means cause great detriment to the State and to the subjects of the plaintiff.

8. Messrs. Day, before they prepared the plates for the documents, were aware of the purpose for which Louis Kossuth intended to use the same, and that he was not authorised by the plaintiff to prepare or issue the same; and that the said documents were in violation of the rights of the plaintiff, as King of Hungary. But they intend to deliver the said notes when completed to Louis Kossuth, and will do so unless restrained by injunction.

(*a*) It was stated in court that notes already manufactured was the weight of the paper of the considerably above seventeen tons.

The bill prayed (besides the injunction) that Messrs. Day might be decreed to deliver to the plaintiff, to be destroyed, the plates and any documents printed or lithographed therefrom, and any other documents purporting to be notes of the Hungarian state or nation, or notes with the royal arms of Hungary printed thereon.

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It appeared from the affidavit of Rudolph Count Apponyi, the ambassador of his Imperial Majesty, made in support, and nearly in the terms, of the allegations in the bill, that he first received information on the 3rd of February, that Messrs. Day & Son were engaged in manufacturing the said spurious notes; on receiving the information he at once applied to her Majesty's principal Secretary of State for Foreign Affairs, and requested that her Majesty's Government would interfere and prevent the manufacture of the said spurious notes; and on the 23rd of February he received a reply from the said Secretary of State, to the effect that her Majesty's Government were unable to interfere; and he at once thereupon communicated with the Government at Vienna of his Imperial Majesty the Emperor of Austria; and on the 26th of February he received instructions to use the name of his Imperial Majesty in such proceedings as he might think necessary to institute with reference to the said spurious notes.

On the 19th of March, the defendants applied, on notice, to have some day appointed for the motion to dissolve the injunction; but it was ultimately arranged to stand over, in order to prepare additional evidence. On the 16th of March, the defendant Kossuth filed the following affidavit:—

" 1. I am by birth a Hungarian noble, of the county of Zemplen, in the kingdom of Hungary. When Ferdinand V., formerly King of Hungary, ceased to be King of Hungary, and the throne was thereby vacant, I was, by the lawfully-summoned and duly-constituted Estates of Hungary, consisting of both Houses in National Diet

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assembled, on the 14th day of April, 1849, appointed and named to be Governor President, until the Diet should have adopted a permanent settlement for the government of the kingdom; and, on the 19th day of April, I took, in the presence of the said Diet, in the great Reformed Church of Debreczen, the solemn oath appointed by the Diet to be taken by me as such Governor President, and then swore that I would be true and faithful to the authority and functions that had been vested in me by the said Diet. The said appointment and nomination, and the authority and functions thereby vested in me, have never been revoked or superseded; nor has any other appointment or nomination been since made; nor has any person, ever since Ferdinand V. ceased to be King of Hungary, been called to fill the throne of Hungary, or been accepted or crowned as King of Hungary, by the said Estates of Hungary, to whom alone the power belongs, by the fundamental laws of Hungary, to do any of these acts.

"2. The plaintiff in this suit is not and never has been King of Hungary either *de jure* or *de facto*. He is not King of Hungary *de jure*, inasmuch as the succession to the throne of Hungary is a matter of strict settlement under the fundamental laws of Hungary; and the claim to that succession can only arise after the death of the last king. But the last king, Ferdinand V., still lives. Moreover, in conformity with the 2nd Article of the Act of the Diet of 1723, by which alone the present House of Hapsburg-Lorraine was accepted by the Estates of Hungary as having, under the conditions therein named, a lawful and thereby established order of succession to the throne of Hungary, the right of succession can only devolve on the next heir of the last king. But the present Emperor of Austria is not the next heir of Ferdinand V., the last King of Hungary, were not that king himself, as in fact he is, still living. The plaintiff

is not King of Hungary *de facto*, inasmuch as, by the fundamental laws of Hungary—which all the last fourteen kings of Hungary have successively sworn shall be observed, in every point and article, by themselves and their successors—no one can be king *de facto* unless and until he has been lawfully crowned as king within the kingdom of Hungary; and he must be thus crowned within six months after the day of the death of a deceased king. And it is particularly declared by the said fundamental laws of Hungary that all the nobles of the kingdom are members of the Sacred Crown of Hungary, and that they are subject to no one except to a lawfully crowned king.

“3. The plaintiff, falsely called in the said bill of complaint in this cause ‘King of Hungary,’ has not, and never has had, the sole and exclusive privilege of authorising the issue in Hungary of notes for payment of money to be circulated in that country as money. Were the plaintiff King of Hungary, which he is not, he would not, without the consent of the Diet, possess this privilege and authority. And not only have this privilege and authority never been granted by the Estates of Hungary to any king of Hungary, but the Estates of Hungary have formally recorded their denial and protest that the king can issue notes of his own authority. The only person to whom the Estates of Hungary, in National Diet assembled, have ever granted the power and authority to issue notes for payment of money, to be circulated in that country as money, and the only person who has ever possessed lawful power to issue or to authorise the issue of such notes, has been myself; to whom, while I was, in the year 1848, responsible Minister of Finance to the then King Ferdinand V., the power to issue such notes was then given by the Estates of the kingdom in National Diet assembled, and to whom, after I had been appointed, named, and sworn as Governor President of

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Hungary in 1849, power to authorise the issue of such notes was then again given by the Estates of the kingdom in National Diet assembled, to meet the emergencies that then existed.

“ 4. The plaintiff, falsely called in the said bill ‘ King of Hungary,’ has not, and never has had, the sole and exclusive privilege of authorising to be affixed to any document intended to be published or circulated in Hungary, the national arms, in the said bill erroneously called the royal arms of that country. Were the plaintiff King of Hungary, which he is not, he would not possess this privilege and authority. There do not now exist, and never have existed, any royal arms of Hungary. The crown of Hungary, which must be deemed the most important part of the arms of Hungary, is the property of the nation, and not of the king, even though he be a lawfully-crowned king. It is expressly declared by the fundamental laws of Hungary, that every noble is a member of the Sacred Crown of Hungary; and I, who am a noble of Hungary, have an absolute and hereditary share in those rights of the nation, of which the crown has always been taken to be the symbol. It is even required, by the fundamental laws of the kingdom, which all the last fourteen kings of Hungary (that is to say, all those of the Hapsburg race) have sworn to observe and keep, that persons shall be chosen by the Estates of the nation, who shall have the keeping of the crown itself, and this within the kingdom of Hungary. The other part of the device engraved upon the said notes, and the whole of which is in the said bill falsely called ‘ The Royal Arms,’ consists of the shield of the national emblem or arms. But neither the use of this emblem, nor the authorisation of the use of it, is in any sense or manner the exclusive privilege of the King of Hungary, did there now exist a King of Hungary, which there does not. The use of this emblem is not only the right of

every Hungarian, but the use of it is, in point of fact, common and habitual with men of all classes in Hungary, and it is daily used and put by them upon published newspapers and other articles of all sorts publicly exhibited for sale. And this is done in strict conformity with the laws and the records of the kingdom of Hungary, which, throughout and invariably, speak of '*Regni Corona*,' and '*Regni Insigne*,' not '*Regis Corona*,' or '*Regis Insigne*.'

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"5. And I say that, in the notes complained of in the plaintiff's said bill, the said national emblem and crown, in the bill erroneously called the Royal arms, are merely introduced into the ornamental border which surrounds the notes, as the well-known national emblem, but not for the purpose of in any respect giving authenticity to such notes.

"6. The notes in the said bill mentioned, and therein falsely called 'spurious notes,' do not purport to be anything else than what is stated in words upon the face of them. They have no resemblance whatever to any other notes mentioned in the said bill.

"7. It is not true, but it is wholly and entirely contrary to the truth, that I have intended, as soon as I receive the notes, falsely in the said bill called 'spurious notes,' to send them to Hungary, and to sell some of them for divers sums of money to any persons resident there or elsewhere, and by this and other means to introduce the same into circulation in Hungary. My intentions could not be known to the plaintiff, or to Rudolph Count Apponyi, his ambassador in England. I affirm and declare the fact to be, that the present state of Europe, and the Austrian Government, being such as to make the happening of great changes in the relations of lawful right and the dominion of force seem not only possible but probable, I deemed it to be my duty to take such means as I was able to meet such an emergency as

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might thus probably arise, and to prevent the state and subjects of Hungary from suffering the detriment that would necessarily follow from the want of a sufficient means of circulation as money; and I have accordingly had the notes in the said bill named, prepared, and made ready, but had already, before the filing of the said bill, made provision for their safe keeping in England until the happening of the emergency which could alone make the use of them in Hungary to be consistent with events. And I affirm and declare that I neither have attempted, nor have ever had the intention to attempt to introduce the said notes, falsely in the said bill called ‘spurious notes,’ into Hungary, so long as the present constitution of forcible dominion exists there. What the plaintiff calls ‘revolution,’ but which will, in fact, be the restoration of the laws and rights of Hungary, must itself have happened in Hungary before the notes in the said bill named can acquire the value of which the plaintiff expresses so much fear through their circulation in the kingdom of Hungary.

“8. Detriment to the state and to the subjects of Hungary cannot, therefore, be caused by the making of the said notes, or by their introduction into Hungary. On the contrary, the said notes could only, under any circumstances, be the means of relief to the state and subjects of Hungary from the great loss and detriment which the said state and subjects have already suffered through acts done in the name and on the part of the plaintiff. When I was Minister of Finance to King Ferdinand V., and it was known that I was about, in that capacity, to arrange for the issue of some notes upon the credit of a metallic basis, the National Bank of Austria, which is named in the said bill, sent one of its directors, the late Baron Sina, to me at Pesth, to beg me not to make arrangements for the issue of such notes, and offering me, in my official capacity, a loan of from 10,000,000*fl.* to 12,000,000*fl.*,

without interest, and such further sum as the exigencies of Hungary might require, if I would consent not to agree to the issue of any notes until the time of the expiration of the privileges which the said bank had from the Emperor of Austria, as such, and not as King of Hungary. I rejected the offer, upon the ground that Hungary had nothing to do with the privileges of the National Bank of Austria. I reported the facts to the Diet, which approved of the course I had taken. These notes were accordingly issued, upon the security of a metallic basis, which, to the amount of several millions of florins in silver, was deposited by me in the Commercial Bank of Hungary at Pesth. The Diet afterwards authorised me, as before said, to issue notes upon the credit of the State; and such notes were issued in the autumn of 1848, and again, under the separate authorisation before mentioned, in the spring of 1849. But these notes differed from those in the said bill mentioned, inasmuch as they bore a date and number in writing, and my official signature as Minister of Finance, or otherwise; while the present notes bear no dates, have a number in print, and have no official title after my name, but the words 'in the name of the nation' are put before my name. When an Austrian army invaded the kingdom of Hungary, by direction of the plaintiff, early in 1849, and it was deemed advisable that the seat of government should be removed for a time to Debreczen, I did not take with me the silver which had been deposited by me in the Bank at Pesth as the metallic basis and security for the notes first above-named, because I supposed that this, not being the property of any individuals, but only of the nation, would be deemed sacred. The invading army, however, took possession of the whole of the silver thus deposited; and afterwards all the three sets of notes which had been issued by me, or in my name, with the sanction and under the direct authority of the Estates of the kingdom,

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were first declared valueless for public purposes, and afterwards ordered by the generals and others acting in the name of the plaintiff, to be given up by the holders; and, in point of fact, a very large quantity of the said notes, amounting in the whole to more than thirty millions of florins in denominational value, were actually afterwards confiscated, whereby the holders thereof were unlawfully and by force deprived of their property and of the fruits of their honest labour and earnings.

“ 9. In consequence of the heavy detriment and loss thus suffered by the state and subjects of Hungary, I have deemed it to be my duty to take such means as will enable the equivalent of the confiscated notes to be restored to those from whom they have as aforesaid been forcibly confiscated, should the circumstances arise that will enable redress to be given for the forcible wrong thus done to a very large number of the persons, and to so large an amount of property, in Hungary.

“ 10. My life and actions are before the world; and it has been my wish and care never to do any act in England which is, or could be deemed to be, an infringement of the laws of England.”

On the 19th of March he filed a second affidavit, denying the title of the plaintiff to be King of Hungary, and setting forth the Act of Settlement passed by the Diet in 1723, and enrolled as Articles of the Diet of that year among the laws of Hungary. The general object of this affidavit appeared to be to show that, by the constitution of the kingdom of Hungary, the sovereign was bound to swear to observe the constitution; that the only prince of the House of Hapsburg-Lorraine who inherited the Austrian dominions, and who did not swear the said oath, was Joseph II. of Austria, who never was acknowledged as King of Hungary.

Sabbas Vukovics, a Hungarian noble, formerly a judge in the county of Temes, member of the Diet of Hungary,

and Minister of Justice of the kingdom of Hungary, deposed that he was well acquainted with the laws of that country, and corroborated the affidavit of the defendant Kossuth; and deposed that the introduction of the notes into Hungary could never create a spurious circulation there, as they could never come into circulation at all unless and until their issue and circulation were lawfully sanctioned by the Diet.

The defendant William Day, a member of the firm, deposed that in October, 1860, he was applied to by Mr. Phillips, a merchant residing at Southampton, to furnish designs for notes to be printed from stone, and sent abroad; that he prepared designs accordingly; that he was afterwards referred to the defendant Kossuth; and that he believed the notes were not intended in any way to be imitations of any notes actually in circulation in Hungary, and that Kossuth had a right to issue them in the form in which they were to be printed.

On behalf of the defendants, there was given in evidence the act of abdication of the Emperor Ferdinand V. of Austria, dated Olmutz, December 2nd, 1848, renouncing the "Austrian Imperial Throne" in favour of his brother's son. This document was signed by Ferdinand and his brother Francis Charles, and countersigned by the Austrian Minister Schwarzenberg, but not by the Hungarian Minister. The circumstance relied on by the defendants as to this part of the case was, that there was no renunciation of Hungary, but only of the Austrian empire, and, consequently, it was contended that Ferdinand V. was still King of Hungary.

On behalf of the plaintiff, in reply, there was given in evidence the affidavit of Colomann Beke, counsel in the Hungarian Chancery at Vienna, Nicholas Rehorovszky, crown advocate in Hungary, and Michael Hengelmüller, President of the Tribunal of Commerce at Presburg, who deposed that they were well acquainted with Hungarian law, and with the events that took place in 1848.

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That in 1817, Francis I. of Austria and King of Hungary, granted a charter to the National Bank of Austria in Vienna, and thereby gave the bank the exclusive privilege throughout his dominions of issuing bank notes. That its privileges have been from time to time renewed, and that the last charter was one granted by Ferdinand V., dated 1841, by which, until 1866, this bank has the exclusive privilege of issuing bank notes. That by the 15th clause it is declared that "the notes of the bank are in circulation a medium of payment favoured by law." For the acceptance thereof in private transactions there is no compulsion; but this special favour is granted to them, that they must be received at all public treasuries as silver coin, according to their nominal value. That the legality of such bank notes had never been questioned in Hungary or by the Diet. That although, in the year 1848, before the commencement of the revolution which began in that year, the Diet of the year 1847 and 1848 passed many resolutions, complaining of matters which they considered grievances, they, to the best of deponent's belief, passed no resolution against the circulation in Hungary of the notes of the bank. On the contrary, the validity in Hungary of these notes has been recognised in many ways; among others, by the notes being taken at the public Government offices, and also at the municipal and other local public offices in Hungary, and by decisions of the courts of law in Hungary. These courts have prosecuted persons who counterfeited the notes as offenders against the laws of Hungary, which punish those who make or issue false money. These laws are to be found in the first part of the *Corpus Juris Hungariæ*, Tit. 14.

The deponents proceeded as follows: "We have perused the bill and the affidavits of Vukovics and Kossuth, and, notwithstanding the statements contained in those affidavits, we are of opinion that, according to the law of Hungary, the charters of the said bank were and are valid.

In Hungary there exists unwritten as well as written law; and we are of opinion that, according to the unwritten law of Hungary, the *lex consuetudinaria*, the king has the sole and exclusive right of granting such authority to issue in Hungary notes for payment of money, as, by the said charter for the year 1841, was granted to the National Bank of Austria. There never has been any law which limits this right. * * * It may be that, to authorise the issue in Hungary of Government notes or paper money, which individuals are to be compelled to take in private transactions, an Act of the Diet is necessary, but the consent of the king is necessary before any such act of the Diet can be of any validity; and when such Act has been passed by the Diet and assented to by the king, the paper money thereby authorised could not be issued except by the king, or by his officers in his name. The issue, to be legal, though authorised by the Diet, must be the act of the king, and, except during the rebellion in Hungary, which occurred in the year 1848-1849, no one ever attempted to issue in Hungary without the authority of the king bank notes such as those issued by the Bank of Austria. * * * The defendant Louis Kossuth states that the notes of the Austrian bank are not a legal tender in Hungary. If this means that private individuals cannot be compelled to take them in payment, this was previously to the year 1848 the fact as regards these notes in Austria as well as in Hungary; for, till the year 1848, the privilege of these notes was that only which is granted by the 15th clause of the charter of 1841; but in the year 1848, in consequence of the monetary difficulties, caused principally by the rebellion in Hungary, the emperor issued an order by which the acceptance of these notes in private transactions was made compulsory. It may be a question of constitutional law whether this order has any effect in Hungary; but we are advised that it is not necessary or material,

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on behalf of his Majesty to discuss this question. If the order has no effect, the notes of the bank still circulate there with the privilege granted by the 15th clause of the said charter. The collection of the taxes in Hungary, and the management of all the state offices there, is of right and in fact under the direction and control of the King of Hungary, without any interference on the part of the Diet; and the document set forth in the 3rd paragraph of the bill, stating that it will be received in every Hungarian State and public Pay-Office, assumes what is the exclusive right and prerogative of the King of Hungary." The affidavit then set out the circumstances under which the defendant Kossuth claimed the right to issue the notes in question; and the affidavit stated to have been claimed in consequence of the king's refusal to issue such notes, and to have been the first act of rebellion. With regard to the silver taken by the emperor, the affidavit stated it to be public money, and that it was applied by the Government to public purposes. On the subject of the royal arms, the deponents set out a passage from a treatise by Cziraky, entitled "Conspectus Juris Publici," paragraphs 335 and 337. The affidavits stated that the national arms with the crown would certainly be considered in Hungary as the royal arms, and though it was true that in Hungary the device was used without objection for purposes of ornament and on documents not purporting to be of a public nature, no one without the authority of the Government had any authority to use it on any document of a public nature, or for any purpose except that of ornament. Any Hungarian who might see the device (referred to in the 4th paragraph of Kossuth's affidavit) on the notes might believe that the paper on which it was engraved was of an official character, and had been issued under the authority of the king's Government.

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Mr. Collier, with Mr. Giffard, Mr. C. T. Simpson,

and Mr. *J. Westlake*, now moved, on behalf of the defendant, to dissolve the injunction.

Mr. *Collier*.—The first proposition I have to submit is, that though sovereign princes are entitled to sue in the Queen's courts, they can do so only in respect of the same subject-matter as private individuals, viz., injury to their property and personal rights.

Secondly, That the act complained of here, if wrong at all, is a public wrong either against the law of Hungary or the law of England, and is not within the jurisdiction of this court.

The first case which established the right of a foreign sovereign to sue in this country was that of *The Nabob of Arcot v. The East India Company* (a); but though it had been previously decided in the same case (b) that the plaintiff, being a sovereign power, could sue, and the defendants, also a sovereign power, could be sued, yet the bill was ultimately dismissed, on the ground that it asked an account of monies advanced and paid in consequence of treaties in the nature of federal conventions. That, therefore, was an authority to show that foreign sovereigns could not sue in respect of political transactions. In Hovenden's supplement to *Vesey* (c), in a note to the case of *The Nabob of the Carnatic v. The East India Company*, reported 2 Ves. 56, that decision was commented on thus: "That a political treaty between sovereigns exercising sovereign authority cannot be the subject of municipal jurisdiction, but that its observance or neglect must depend on that respect which the parties bound thereby can be made to feel, for the *jus gentium* is established by the final result of this case." Lord Rosslyn thought it doubtful whether, in any case, a foreign sovereign could sue or be sued in a municipal court in this country: *Barclay v. Russell* (d).

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(a) 4 B. C. C. 180.

(b) 3 Ibid. 292.

(c) Vol. I. page 149.

(d) 3 Ves. 424—431.

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In *De La Torre v. Bernales* (a), which was a bill seeking to charge the defendant for acts done by him as agent for the King of Spain, the Vice-Chancellor directed the king to be made a defendant, laying it down that a foreign sovereign might sue and be sued in respect of personal demands of a private nature. The next case was that of *Hullett v. The King of Spain* (b), in which Mochado as agent of the King of Spain, had received from the French Government a sum of money in satisfaction of the claim of certain Spanish subjects. In that case a demurrer was filed, which was overruled first by the Court below, and afterwards by the House of Lords. That case was decided by both Lord Lyndhurst and Lord Redesdale on the ground that the agent had money of his principal which he was bound to pay over. Lord Redesdale said, "I have no doubt foreign sovereigns have a right to sue, otherwise there would be a wrong without a remedy. He sues on behalf of his subjects, and if foreign sovereigns were not allowed to do so, the refusal might be a ground of war." The case came on again on a motion that the defendant's answer might be taken without oath (c), on the ground that a foreign sovereign suing in these courts is to all intents and purposes in the same position as a private individual. The Lord Chancellor there observed, "That a foreign sovereign did not sue by petition of right; he must sue and be sued by his title, but he brings with him no privileges which exempt him from the common fate of other suitors."

The principle of that decision was, that a foreign sovereign could not sue for the purpose of redressing a public wrong, though he might sue in respect of property which was the property of the nation; and the

(a) Not reported, but decided on the 22nd of April, 1818, and referred to in *Hovenden*, vol. i., p. 149.

(b) 1 Dow. & C. 169.

(c) Bligh, N.S. 356.

same principle was laid down in the case of *The King of the Two Sicilies v. Wilcox* (a). In that case the plaintiff was held entitled to personal chattels by the doctrine of ear-mark.

The next case is that of *The Duke of Brunswick v. The King of Hanover* (b), in which it was held, that the King of Hanover, though liable to be sued in these courts for acts done in the capacity of a subject, could not be sued here when the acts were done abroad, and when it was doubtful in which capacity the acts had been done.

These cases indisputably established the proposition that a foreign sovereign is entitled to sue in respect of any property traced into this country, and which has been improperly dealt with, but that these Courts would not interfere actively against a foreign sovereign, and by parity of reason it would seem, would not act in his behalf. It remains to consider the right asserted and then the wrong complained of, and then to show that neither the right asserted nor the wrong complained of are within the cognizance of this Court. The right asserted is, that the plaintiff has the exclusive right to issue paper money in Hungary, and to affix to any document the royal arms of Hungary.

Assuming the plaintiff is King of Hungary, he must prove the right he claims just as if he were a subject. This Court would take notice of the fact that Hungary is a constitutional monarchy, and, consequently, if the plaintiff has the right claimed he must have it either by the constitution or written laws of Hungary. If it be contended that the prerogative right of coinage is one recognised by the law of two nations, there is a material difference between issuing paper and manufacturing the precious metals into money: *Vattel* (c).

That distinction was obvious; in the one case there

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(a) 1 Sim. N.S. 301.

(c) Chitty's ed., p. 44.

(b) 6 Beav. 1.

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was some intrinsic value in the thing all over the world; in the other, it is a mere promise to pay, depending on the will of an emperor or individual. Any one has a right to circulate as many promises to pay as he pleases; therefore, the plaintiff is bound to prove the right he claims to restrict the defendant's right.

But again, if he does prove that right, it is a right depending on municipal law, and is therefore not within the cognizance of this Court. No doubt, this Court will recognise foreign law as to a question of contract or status, as marriage, if not contrary to our own, and perhaps being strictly personal, such as personal character. But the Court will not recognise a right (not being within the class specified above) conferred by a municipal law: *Jeffreys v. Boosey* (a). In that case the House of Lords decided that these courts will not recognise the copyright of a foreign country so far as restraining its infringement here. The plaintiff is bound to prove the right for which he contends; but the right, if it exists at all, must depend on the municipal law of Hungary, and if so, cannot be recognised by this Court. This was also decided in *Caldwell v. Vanvlissengen* (b), as to a right of patent, and in the case of *Holman v. Johnson* (c) as to the revenue, in which Lord Mansfield said, "No country will take cognizance of the revenue laws of another."

With regard to the question of trade marks, there was here no pretence of imitation or counterfeit. The only ground on which the Court interferes as to trade marks is where one party, by means of imitation, passes off his goods as those of another: *Sykes v. Sykes* (d). Here the two notes were obviously different; but even if they were similar, that would be a felony by the 11 George 4 & 1 Wm. 4, c. 66, s. 19.

(a) 4 Ho. Lds. 815.

(b) 9 Hare, 415.

(c) 1 Cowp. 341—3.

(d) 3 B. & Cress. 541.

Secondly, this wrong, if a wrong at all, is a public wrong, or, in other words, a crime either by the law of England or the law of Hungary; and in neither case has this Court any jurisdiction to restrain it. If the act is an offence by the law of Hungary, the emperor can obtain redress in his own courts; if it is an offence by the law of England, the plaintiff can proceed like any other prosecutor. In *Southey v. Sherwood* (a), this Court refused to interfere by injunction where the nature of the book was such that the author could not maintain an action for damages; the same thing was laid down in the case of *Lawrence v. Smith* (b). Again, in *Gee v. Pritchard* (c), it was held that the Court had no jurisdiction to restrain crimes except in cases involving the protection of infants. The only ground, in cases of this kind, for the interference of the Court is for the protection of property.

In *Curtis on Copyright*, 150, a decision of Lord Eldon was referred to, cited from *Petersdorff's Abridgment*, 558, 559, to show—and in *Clark v. Freeman* (d), the same principle was acted on—that the Court will not interfere in these cases except to protect property. In *The Attorney-General v. The Sheffield Gas Company* (e), it was sought to obtain the interference of the Court on the ground of an apprehended breach of the peace; but the Court disclaimed that ground, and held that it was on the ground of injury to property alone that the jurisdiction of the Court must rest. That doctrine was fatal to the case of the plaintiff in this Court. Put the case thus: the Court will only interfere to protect some legal right; then could the plaintiff maintain an action? Clearly not. The declaration, when drawn, would be nothing but an indictment for an offence committed against the

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(a) 2 Mer. 439.

(d) 11 Beav. 112.

(b) Jac. 473.

(e) 3 De G. M. & G. 304.

(c) 2 Swanst. 413.

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plaintiff, his crown and dignity. If the Court of Chancery had this jurisdiction, what was the use of the Foreign Enlistment Act? And how is it that neither Lord Brougham nor Sir James Macintosh, in their objection to the Act, pointed out that that jurisdiction existed already in the Court of Chancery? What was to prevent the Emperor of China from filing a bill to restrain the smuggling of opium? [The learned counsel referred to *Hudson*, p. 32, and then read a further affidavit, contending that the intention to use these notes while the plaintiff's dynasty was supreme was denied.]

[The affidavits were then read, and labels on bottles and newspapers were exhibited, to show that the emperor was not exclusively entitled to use the royal arms of Hungary. The plaintiff's affidavit in reply was also read.]

Mr. *Collier* then renewed his argument.—By the law of nations, the emperor never had the right claimed; but, even if he ever had it, it has been taken from him by the law of Hungary. It is incumbent on the plaintiff to prove the right he claims, because, though this country recognises the *de facto* sovereign of a country, the constitutional right of sovereigns must be proved in the ordinary way.

In the first place, without the consent of the Diet the plaintiff never could have this right, and if he ever had it, both he and his predecessors on the throne have expressly renounced it. Hungary is a constitutional kingdom, and forms no part of the dominions of Austria. The Austrian empire is, in fact, a creation of the present century. It is true, since 1527, the Archdukes of Austria have occupied the throne of Hungary. There have also been Kings of Hungary who have not been Emperors of Germany—a fact which illustrates the distinction. The rights and privileges of the Kings of Hungary depend on the Act of Settlement of 1723, which this Court must notice,

as it has been recognised by treaties to which the Crown of England has been a party, and particularly by the treaties of Vienna and Aix-la-Chapelle. [The learned counsel then referred to and commented at some length on the second affidavit of the defendant Kossuth.] By that Act of Settlement, the Kings of Hungary have declared that no act on their part is valid unless confirmed by the Estates of the realm, and that they would not govern the country by edicts and proclamations. But the Estates of the realm have declined to give this very power to the king.

The plaintiff does not assert a right of coining the precious metals, his claim is to issue promissory notes; and that he must prove by evidence, as it is clearly not a prerogative right given by the law of nations. Secondly, if he had such a prerogative by the law of nations, as regards Hungary his is only a limited monarchy; and his right is not allowed by the Diet.

There is no writer on international law who places the prerogative right beyond the coinage of metal, which is a right recognised by Lord Coke; but that is a different thing from the right of issuing paper money. Mr. Chitty's edition of *Vattel* is comparatively recent, but he recognises no such right. [Mr. Collier read and commented on the second affidavit of M. Kossuth, and proposed to read an extract from a State paper setting forth the mediation of England between the King of Hungary and the insurgent States.]

Sir *Hugh Cairns* objected, that this, if evidence at all, was a treaty, and must be produced from the Foreign Office and duly proved.

The VICE-CHANCELLOR allowed the extract to be read *de bene esse*.

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Mr. *Collier* then called 'his Honour's attention to the constitution of Hungary, for the purpose of showing that the plaintiff, by the law of Hungary, had not the right specified in the bill; and contended that the evidence showed that the plaintiff had not the monopoly of the use of the Royal arms of Hungary. There was a distinction between the *insignia regni* and *insignia regis*; in fact the nobles are members of the Sacred Crown of Hungary and entitled to use the royal arms.

In conclusion, the plaintiff, though recognised diplomatically as governing Hungary, yet coming into an English court, must prove his title, which has not been done here. He is not King of Hungary, because the only crowned King of Hungary still lives, and has not been shown to have abdicated: and if he had, the throne could only be filled by the election of the Estates.

Again, assuming he is King of Hungary, he has only a limited authority, limited by the Act of Settlement, from which he alone derives his title to the throne, and which deprives him of the right he claims, even if it had been given him by the law of nations.

Again, even if he had this right, it is a public right, of which this Court will not take cognisance, neither will the Court take cognisance of a mere right conferred by foreign laws on a foreign subject.

Lastly, the injury complained of, if injury at all, is a political offence, of which this Court will not take notice. If it be an offence, it is a crime, and must be dealt with in a criminal court. If it is an offence by the law of Hungary, the plaintiff has himself the means of redress, and must not come to this Court for aid to govern Hungary. This Court has never exercised such a jurisdiction, and it will not now, for the first time, attempt to do so.

Mr. *Giffard* on the same side.

If the injunction has been improperly obtained, whether it be injurious to the defendants or not, it cannot stand. It is only necessary for the defendants to make out one of three propositions, in order to entitle them to have the injunction dissolved. First, if the plaintiff has not acted in good faith; secondly, if he has misled the Court by misstatement of facts; or lastly, if his object in coming to this Court is illegal, the injunction must fall. But, further, in order to entitle him to keep this injunction, he must show such a case as entitles him, according to the principles on which this Court exercises its jurisdiction—a jurisdiction it will not enlarge—to the interference of this Court.

The plaintiff, as is shown by the evidence, has been guilty of bad faith. He has suppressed the truth, and has misled the Court, when, by the affidavit of his ambassador, he alleged that he had the exclusive right of issuing promissory notes and of using the royal arms of Hungary. On his own evidence, this is disproved.

Again, it is quite clear, from his own evidence, that he seeks the aid of this Court to enable him to enforce the illegal order he has made, commanding his subjects to accept notes issued by himself without the authority of the Diet, and in violation of the constitutional laws of Hungary. On the ground, therefore, of suppression, misstatement, and that the purpose is illegal, this injunction cannot be maintained. A sovereign coming into this Court is in the position of an ordinary plaintiff, he must answer a cross-bill, and would be bound to give evidence on a commission, and is subject to all the rules of this Court to which a private individual would be subject. Moreover, he must come here with clean hands. In a late case, Vice-

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Chancellor Wood refused to protect a trade mark against a clear infringement, because the plaintiff's mark stated the bobbins were 100 yards, whereas they were only 70.

Here the suppression is in reference to the very right claimed. It is clear the Bank of Austria has the right the plaintiff claims, if it exists.

Again, the right to the royal arms, if it be anything, is a right analogous to that of the right to a trade mark; but there is no property in a trade mark. In *Silverlock v. Farina* (a), Vice-Chancellor Wood distinctly said that, to entitle a plaintiff to relief, he must be in a position to maintain an action, on a declaration that the defendant was fraudulently passing off his goods as those of the plaintiff.

In *Sykes v. Sykes* (b), Lord Hardwicke said, there is no right to injunction unless there is a right to maintain an action. In *Perry v. Truefit* (c), the same principle was laid down. The principle of all the decisions on trade marks is, that one man has no right to represent his goods as those of another; but that principle has no application to this case, because the defendants do not represent the arms on their notes as those of the plaintiff. The evidence shows they are in common use. They are not the arms *regis*, but *regni*, which every nobleman has a right to use. It was established beyond controversy in *Jeffreys v. Boosey* (d), applying the reasoning of Lord Brougham, that our law recognises no property in a trade mark, and still less in one that had been used commonly from time immemorial; and, therefore, whatever right the plaintiff has must be guided by the *lex loci*; and if so, there is an end of this part of the plaintiff's case. There is no fraud, no trust suggested—but merely an alleged legal

(a) 1 K. & J. 509.

(b) 3 B. & Cr. 541.

(c) 6 Beav. 68.

(d) 4 Ho. Lds. Ca., p. 975.

right, which the plaintiff contends gives him a *locus standi* in this Court.

Then, as to damage, on his own showing, the only damage that can accrue is to the Austrian Bank, to whom he has granted the exclusive right to issue these notes. How, then, can any right to damages be in the plaintiff? Moreover, there is not a statement anywhere that the plaintiff's notes would be prejudiced.

The plaintiff alleges, indeed, that these notes are to be used for the purpose of promoting revolution and disorder: but that, if true, is no ground for the interference of this Court: *The Attorney-General v. The Sheffield Gas Company (a)*.

All the cases which had been already brought before the Court are resolvable into one category: they are all cases in which proceedings were taken in respect of property within the jurisdiction; and unless relief had been granted in such cases by this Court, there would have been no remedy. It was not possible for the foreign sovereign, by the exercise of his own authority within his own dominions, to obtain the relief afforded by this Court. That shows the distinction between those cases and the present one. Here the avowed object is to prevent the introduction into the plaintiff's dominions of these notes; he had, therefore, the remedy in his own hands. It is manifestly not the duty of this Court to interfere, in order to enable the plaintiff to govern his own dominions. In *Johnson v. Machielsne (b)*, which was an action by foreign sailors, who had stipulated not to sue the captain abroad, Lord Ellenborough said, "If this were merely the regulation of a foreign Government, I should leave the foreign Government to enforce it, by punishing the infraction of it, or by any other means that might be more effectual ;

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(a) 3 De G. M. & G. 304.

(b) 3 Camp. 44.

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but it is impossible to say that this personal stipulation is void." There are numerous cases in which the Court will not interfere, though the damage may be enormous. In *Sharp v. Taylor* (a), Lord Cottenham recognised the principle, that these Courts would not interfere to prevent smuggling. *Wheaton on International Law* (b) also laid down the same doctrine. Suppose, then, that the plaintiff alleged the defendants were about to export goods into Austria, the effect of which would be to deprive him of half his revenue—it is perfectly clear this Court would not interfere. If the Court continues this injunction, how could it refuse to prohibit dealing with a loan raised by the insurgent States of America? But to grant such an injunction would be a just cause of war. The truth is, these transactions are transactions between Governments, and not within the jurisdiction of the civil tribunals of the country. Again, if the Court had this power, why was it not applied to restrain foreign enlistment? But no one ever supposed the Court of Chancery had jurisdiction in such a matter. Why? Because a foreign sovereign's rights are not extra-territorial. He is recognised by other States for the purposes of peace or war, but not in reference to matters of revenue, or in reference to the municipal laws of his own State. "It is plain," says Mr. Storey (c), "the laws of one country have no intrinsic force, *proprio vigore*, except within its own limits. They can only bind its own subjects, and others who are within its jurisdictional limits, and the latter only while they remain there." Again, he proceeds, adopting the language of a great jurist, "Of strict right all the laws made by a sovereign have no force or authority except within the limits of his dominions, but the necessity of

(a) 2 Phill. 801, 816.
 (b) Page 113.

(c) *Conflict of Laws*, s. 7, p. 11.

the public and general welfare has introduced some exceptions in regard to civil commerce." [The learned counsel read several extracts from Storey.] Now, it is perfectly clear that the object of this bill is to prevent something being done within the territories of the plaintiff; but, if so, it follows from the principles laid down in all the cases, that other States have nothing to do with such questions; the remedy is in his own hands.

With regard to the statute which makes it a forgery to counterfeit foreign money simply, that makes the offence a felony, and applies indiscriminately to the notes of all countries alike—American and others—but does not deal with the right of issuing such notes, which is left to the laws of each particular State. Moreover, that this Act does not prohibit what the defendants claim to do is plain from the refusal of the Government to interfere.

On all these grounds the injunction must be dissolved.

Mr. C. T. Simpson on the same side.

The right, as alleged in the bill, gives no *locus standi* in any court of law and equity. An alien could only sue in our courts for rights in relation to property, and for personal rights. The right claimed here, if anything, is a personal right, and if so, must be the subject of an action at law; but it is quite clear that no action could be maintained, and if any proceedings at law can be taken, they must be in a criminal court.

The right to property may be classed under four heads:—First, the right by succession; secondly, the right by contract; thirdly, the right arising from trust or confidence; and fourthly, the rights arising from fraud. No right has ever been recognised which does not come under one of these heads.

Take the case of trade mark. This Court will not

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protect the right to the use of a foreign trade mark unless on the ground of fraud committed. The mere creation or recognition of a right by foreign municipal law is not enough to entitle an alien to relief in these courts without superadding thereto some element such as that of contract or fraud, which are extra-territorial. In the case of the *Collins Company* the plaintiffs were Americans and the defendants English. In this branch of the Court the defendants submitted; but, in the case of the *Collins Company v. Brown*, before Vice-Chancellor Wood, the defendant demurred, on the ground that the plaintiffs were a foreign company, and had their remedy in America. The Vice-Chancellor admitted, that but for the fraud in relation to property, this Court could not have granted relief (*a*). In all the cases in which this Court has interfered, the wrong complained of affected property, of which the Court could take cognisance.

No country recognises the municipal laws of another. If a murder were committed in Vienna, and the murderer can reach England, he is safe. Suppose a foreign State confiscated the property of a subject which was in England, this Court would not recognise such confiscation: *Ffolliott v. Ogden* (*b*). The second instance is foreign copyright, *i.e.*, existing by virtue of foreign law, which it is clear this Court will not recognise: *Delondre v. Shaw* (*c*); *Jeffreys v. Boosey* (*d*). Can the plaintiff allege here a better title than that of foreign copyright? Surely not. The distinction between rights existing by contracts and rights existing by virtue of foreign law was shown by the case of *Johnson v. Machielsne* (*e*).

It remains to be shown that the rights claimed by the plaintiff do not fall within the class of cases involving

(*a*) 3 K. & J. 432.

(*b*) 1 H. Bl. 124; s.c. 3 Term Rep. 726.

(*c*) 2 Sim. 237.

(*d*) 4 Ho. Lds. Ca. 815.

(*e*) 3 Camp. 44.

contract, trust, or fraud. The rights claimed are, first, the exclusive right to issue notes, and the right to the exclusive use of the royal arms of Hungary. It is clear that there is no question of trust or contract; in fact, no such right is alleged. Then, is there any case of fraud? The only passage charging fraud is that in the affidavit in reply, by which it is alleged that a person seeing the royal arms on those notes might suppose they had been issued by the plaintiff; but that paragraph could not be used, as it was not the case made by the bill. In the case of *Prince Albert v. Strange* (a), the plaintiff tried to prove the case by amendment, but it was held he could not. In the case of *Cresy v. Beavan* (b) the same rule was laid down.

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Having shown, then, that the plaintiff has not the exclusive right of issuing bank notes, and, secondly, that whatever right he had, he had parted with to the Austrian Bank, it remains to be seen whether, according to the law of Hungary, the plaintiff has the right he claims; but it is clear, from the evidence, that he has not that right. Not only is that right denied by the defendants, but the plaintiff's own evidence disproves it.

But, even assuming that he had these rights, they are public rights, having no relation to private property, and the invasion of them is a public wrong and must be vindicated in a criminal court. The bill does not allege that the issuing of these notes could be made the foundation of any civil process in Hungary. How, then, can the plaintiff make that which, if anything, is a crime in Hungary, the basis of proceedings in this Court? There is no authority for any such proposition, but, if so, the plaintiff's case fails. If there was one point better settled than another, it was that this

(a) 1 M. & G. 25, 47.

(b) 13 Sim. 354.

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Court will not punish or restrain against crime: *Gee v. Pritchard* (a). The sole ground of the equitable jurisdiction of this Court, with the single exception of the case of infants, is property. The case of *Clark v. Freeman* (b) well illustrated this view. *Cox v. Cox* (c), *Lawrence v. Smith* (d), *The Attorney-General v. The Sheffield Gas Company* (e), all established the same principle—that this Court will not interfere against crime, but will deal only with property. Moreover, the injury to property must be such as would maintain an action at law. It is quite clear no action would lie here, both because our Courts have no jurisdiction to deal with the subject, and because no damage could be shown. Before any damage could be occasioned, the notes must be introduced into Hungary, in which case the plaintiff's remedy is in his own hands. In order to test the case, let it be considered what is the plaintiff's right against the printers. Messrs. Day had violated no right of the plaintiff. It will not do to argue that damage may arise from the creation of these notes, because the right of action must co-exist with the right to the injunction.

Again, the plaintiff must come with clean hands, *Pidding v. How* (f), or he could not obtain relief in these Courts. In this case the plaintiff claims the exclusive right to issue paper money in Hungary, but admits, nevertheless, that a charter was granted to the Bank of Austria to issue notes; and further, that it is a question of constitutional law in Hungary whether the order making the acceptance of such notes compulsory is valid. On the principle of *Pidding v. How*, the plaintiff had lost any right to relief which he may have had. Again, the

(a) 2 Swanst. 402.
 (b) 11 Beav. 112.
 (c) 11 Hare, 118.

(d) Jac. 473.
 (e) De G. M. & G. 304.
 (f) 8 Sim. 477.

same principle was laid down in *Flavel v. Harrison* (a) and in *Wright v. Tallis* (b); even at law, a plaintiff who had been a party to an attempt to mislead the public was held, on general demurrer, incapacitated from bringing his action. Therefore, even where there is property, a court of law will not assist a plaintiff guilty of bad faith.

Lastly, if the plaintiff has any right of complaint at all, it is not in any civil court he must look for his remedy. The right, if any, is grounded on the *ultimatum regum*, i.e., the *casus belli*: and that may be a very proper argument, and ought to be raised, if at all, by the Attorney-General in the name of Her Majesty before a constitutional tribunal.

On these grounds, the injunction ought to be dissolved.

Mr. *Westlake* appeared on the same side, but, inasmuch as three counsel had been heard on behalf of M. Kossuth, would not add to the argument.

Mr. *Bacon*, for Messrs. Day & Sons.

Messrs. Day & Sons claim the right to have this injunction dissolved, so far as it affects them. The plaintiff's complaint against them is, that in the ordinary course of their business they have done something which he has a right to restrain. They are deeply interested in this question, because they have incurred great expenses in executing the order. It is important to remember that it is not pretended that these notes are counterfeits, or, in other words, forgeries; that would be an intelligible ground of complaint, but these notes are original, and unlike any other notes in use.

The policy of the law requires that foreign notes and bills of exchange should be protected; and statutes have

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(a) 10 Hare, 467.

(b) 1 Com. B. 893.

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been passed for that purpose, which, however, were repealed as being too severe, and the Act of the 11 Geo. 4 & 1 Wm. 4 has been substituted in their place, repealing the capital punishment of former enactments, and in the 19th section defines the law. That is the only existing statute now applicable to the offence of counterfeiting foreign paper money and securities. It is not pretended there is any rule of common law which touches the question. But what right, then, has the plaintiff to restrain an English tradesman from conducting his business under the protection of the law of England? This Court grants no injunction which is not founded on such a legal right as would maintain an action at law; but can it be contended for a moment that the plaintiff could maintain an action for the alleged wrong? If he can, let him establish his right in the ordinary way, and having done so, then come to this Court for relief.

The *gravamen* of the charge against Messrs. Day is, that having made these notes they will deliver them to Kossuth, who will sell them to some purchaser who will buy them—not in England, but in Hungary. Suppose that be so, the circulation of these notes in Hungary is no offence against English law. It is next said, the notes are to be used for the purposes of revolution and disorder; but that allegation, suppose it true in fact, is no ground for the interference of this Court. There is, it is said, a *dictum* of Lord Macclesfield, that the Court could grant an injunction to restrain the publication of an improper book. In the time of the Star Chamber, such a jurisdiction might have existed, but no attempt has been made in these modern times to preserve it in order to prevent revolution in a foreign country, or to sustain the rights of foreign sovereigns in their own dominions. Again, at the close of the 7th paragraph, the bill alleges that the plaintiff never authorised such manufacture of notes, and

the introduction of them into Hungary will cause great detriment to the state and to the subjects of the plaintiff. But this Court has nothing to do with the plaintiff's state or subjects, who must be protected *aliunde*. Could an action be maintained for the damage alleged in this paragraph? But if not, how can the injunction be maintained? Again, could an action be maintained for the damage done to the rights and privileges of the plaintiff? That is not even pretended. The fact is, the bill is demurrable; it answers itself.

Again, the plaintiff, on obtaining this injunction *ex parte*, suppressed the truth and asserted what was untrue. The evidence shows he has not the exclusive right to issue paper money because the National Bank of Austria has such right; and secondly, without the consent of the Diet, the plaintiff has not himself the right he claims.

In order to bring his case within the doctrine of trade mark, he alleges an exclusive right to the use of the royal arms of Hungary, while the evidence shows that the use of such emblem in Hungary is as common as the lion and the unicorn in England. But, even if he had the exclusive right in Hungary, there is no property in a trade mark; and, there being here no pretence for fraudulent imitation, the injunction cannot be maintained.

But, assuming the plaintiff's right on all these points, there then arises the question, whether a foreign sovereign can sue in England in respect of any rights other than those relating to his person or property. The law is well settled by the decisions that have already been referred to, and may be summed up in a word—that no municipal right, originating in a foreign country, can be asserted here: *Jeffreys v. Boosey* (a).

This injunction is an attempt to make this Court subservient to the Austrian police, because the real object is

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to prevent M. Kossuth from doing something in Hungary which the plaintiff—if his power is supreme there, as he alleges—has himself the means of doing.

Messrs. Day have been guilty of no concealment or underhand practice, but, on the contrary, on being applied to by Sir Richard Mayne, acted with the most complete good faith and candour, denying that they had violated the law of nations or any law of this country—a denial which the police, by abandoning the case, have virtually admitted to be true.

On the whole, the plaintiff's case has failed, and the injunction must be dissolved. He did not give the undertaking now usually required on applications for an injunction; but, at all events, the Court can and ought to secure Messrs. Day against the costs of these unjust proceedings.

Mr. Wickens, on the same side.

The arguments used on behalf of M. Kossuth apply with equal force to the case of Messrs. Day, and need not be repeated. Though the cases are generally the same, there were yet distinctions which must be borne in mind. The Court appeared to doubt whether, on M. Kossuth's own evidence, he was seriously damnified by this injunction; but, however that may be as regards M. Kossuth, there can be no doubt but that this injunction is a serious injury to Messrs. Day. Every hour the injunction continues is a serious injury to Messrs. Day.

On the merits, the case resolved itself to this—that this injunction cannot be maintained, unless the Court is prepared to lay down this proposition, that a foreign sovereign is entitled to restrain, by injunction out of the Court of Chancery, any act having a tendency to invade his prerogative within his own dominions; but the invasion of the prerogative of a foreign sovereign within his

dominions, is a crime punishable by law. But the right of a foreign sovereign, in such case, is a right against criminals; and yet, if such be the law, those rights in the Court of Chancery become civil rights. There is no trace of any such doctrine to be found in the books or in the dicta of the judges, whose decisions have settled the law of this Court. If the plaintiff is right in his claim, there must be a specific, peculiar, separate jurisdiction of the Court to restrain any act which would tend towards an invasion of the prerogative of a foreign sovereign. But the absence of any authority, and the silence of the judges and text-writers, clearly show that no such jurisdiction exists; and the Court of Chancery will not seek to enlarge its jurisdiction to meet a particular case.

It is certain, a foreign sovereign cannot maintain an action to recover damages for injury done to his prerogative; but, if so, no injunction is maintainable. The absence of authority in favour of such a right is a strong ground for doubting its existence, but there is besides authority against it. It is well settled, that a foreign sovereign cannot come into this Court to restrain the violation of his revenue laws: *Sharp v. Taylor* (a). There is a strong analogy between the right to regulate the revenue and the right to regulate the currency; yet a foreign sovereign cannot come here to prevent smuggling. There is a further analogy between the right claimed and the right to copyright; but here, again, this Court will not interfere to protect foreign copyright. Could a foreign sovereign induce this Court to restrain an English printer from printing books, which by the copyright law of the foreign state could not be printed there? Clearly not. The Court would not restrain the Bible Society from printing bibles in Italian or Spanish at the instance

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(a) 2 Phill. 801--816.

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of the sovereigns of Rome or Spain, on an allegation that they were about to be circulated in the Papal States or in Spain; but, if so, it is difficult to see on what principle this injunction can be maintained.

Assuming, then, that this Court has, at the instance of a foreign sovereign, no jurisdiction to restrain the invasion of his prerogative, the plaintiff's whole case falls to the ground. There is, perhaps, what has suggested this bill, a faint analogy between the right claimed here and that dependent on the doctrine of trade mark; but, in order to dispose of that, it is sufficient to point out the fact that there is here, *ex concessis*, no attempt at imitation, or to substitute one thing for another. It is clear, also, that relief in cases of trade mark depends on the question of damage. *Clark v. Freeman* (a) established very clearly, that the principle on which this Court interferes is damage to property. In that case, Lord Langdale held, that, though Sir J. Clarke's trade was injured indirectly, yet that, as there was no damage to property, the Court could not interfere. A stronger case could hardly be conceived. Moreover, this Court, in no single instance, interfered to protect trade marks in a case in which, from the nature of it, no action would lie. It is almost a proverb, that where a plaintiff comes to this Court to restrain the invasion of a trade mark, it is in the discretion of the Court, at the instance of the defendant, to withhold the injunction until the plaintiff has first established his legal right by an action at law. It is impossible to maintain that an action at law could be maintained against Messrs. Day; but, then, it is difficult to see on what ground the injunction can be maintained. If it be maintained at all, it must be maintained on much higher ground than the principle of trade—a ground which will be a new branch of the jurisdiction of this

(a) 11 Beav. 112.

Court, but for which, up to this time, there is no authority whatsoever. On all these grounds, the injunction ought to be dissolved.

Sir *Hugh Cairns*, on behalf of the plaintiff.

The arguments which had been urged on behalf of the defendants were upon the doctrine of the Court as to trade mark, foreign copyright, and upon the power and jurisdiction of the Court in support of criminal law and foreign fiscal law, but they did not deal with the short and simple case before the Court. [The VICE-CHANCELLOR.—I will relieve from that part of the argument which relates to trade mark, and also from that part of the argument as to Messrs. Day, because, if you are entitled to the injunction against M. Kossuth, the case against Messrs. Day follows as a matter of course.] These gentlemen have taken an order from a person who, we say, had no power to give such order; and their right to execute the order must depend on the right of those who gave it.

A great part of the evidence is addressed to the question, whether the plaintiff is King of Hungary. That issue has been designedly and elaborately raised by the affidavits, but it has been abandoned at the bar. On a question of that kind, the jurisdiction of this Court, extensive as it is, is limited; because we must assume that person to be the sovereign of a foreign state whom Her Majesty, in whom is vested the power of entering into diplomatic relation with foreign sovereigns, recognises as such.

There are two cases which strongly illustrate the principle on which this Court acts in these matters. In the case of *The King of the Two Sicilies v. Wilcox* (a), there had been a warfare between the people of Sicily and the sovereign, in 1840, in which the people had succeeded

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so far as to subjugate the island; and not only that, but the Queen's Government had recognised the insurgent flag, and had admitted the overthrow of the king's authority, and was engaged in negotiation as to who should succeed to the crown. After the restoration of the king's authority, the bill was filed in respect of acts done, *flagrante bello*, by the *de facto* government, and which the Sovereign of this country had recognised; but Lord Cranworth said, "I have to inquire who is recognised by the Queen as the rightful ruler in Sicily. I find that person is the King of the Two Sicilies, and I cannot look further."

The case of *Taylor v. Barclay* (a) is equally illustrative of the doctrine of the Court on this subject. In that case, a device of pleading was adopted, which, no doubt, was thought highly ingenious. A government, professing to be that of a South American State, which had separated itself from the dominion of Spain, filed a bill in this country in the name of their president, and averred on the face of the bill, that it had been recognised by the Sovereign of this country as an independent state. A demurrer to the bill was filed, and it was argued, that, according to the ordinary rule of the Court, the allegation of the bill must be considered as true; but the Vice-Chancellor refused to adopt this allegation as a true averment of who was the ruler of that country, but said he could only know judicially as ruler, that person whom the sovereign of the country, whose officer he was, recognised as possessed of the supreme authority in that country, and he allowed the demurrer, on the ground that the averment in the bill was untrue. [The VICE CHANCELLOR.—I think you may assume that the plaintiff is King of Hungary.] That, therefore, is the first step in the argument. Then arises the question, what are the rights of foreign

(a) 2 Sim. 320.

sovereigns in these courts? In discussing this part of the case, two propositions have been laid down, for which there does not appear to be a scintilla of authority in the books. First, it is said that the right of foreign sovereigns to sue in this country is confined to personal demands of a private nature; and secondly, it is contended that the property to be sued for must be in this country. With regard to the first proposition, if this is a correct definition of the right of a foreign sovereign, that right is only the right of any foreigner; but no one ever doubted that any foreigner, not being an alien enemy, can sue in our courts for personal demands of a private nature. It follows that, where the question is raised as to the right of a foreign sovereign to sue, what is meant is his right to sue as sovereign, and further, the right to sue in respect to those rights peculiar to sovereigns. The very fact that a question has been raised demonstrates that the right, if it exists, cannot be merely that right which belongs to every individual not being an alien enemy, but must be the right to sue in respect of the rights of sovereigns, as distinguished from those of individuals.

The passage cited from *Hovenden*, p. 149, in the note to the case of *The Nawab of the Carnatic v. The East India Company*, referred to the peculiar circumstances of the case. The East India Company, suspecting treachery, seized the Nawab's property in the exercise of a belligerent right, but being not only a foreign sovereign, but also a trading company, were liable to be sued in our courts; and the question argued was, not the right of a foreign sovereign to sue, but whether the act done was an act of state, and the Court held it was, and not cognizable by the Court—not because the plaintiff was a foreign sovereign, but because of the character of the act complained of. The case of *The Duke of Brunswick v. The King of Hanover* (a) was one of exactly the same kind;

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and, commenting on that case, Mr. Hovenden pointed out the distinction between cases in which the act is of a public nature, such as those above referred to, and an act of a private nature relating to property. The principle of this kind of cases was very much commented on in a recent case not yet reported—the case of *The Rajah of Tanjore v. The Secretary of State for India*, before the Privy Council. The complaint was, that the East India Government had taken possession of the Rajah's property in the state of which he was governor, assuming the state to be part of our Indian empire. The Court in India decided in favour of the Rajah's executors, but the Privy Council reversed the decree, on the ground that the act was an act of state, and could not be the subject of a suit between individuals.

What, then, is the meaning of the proposition, that foreign sovereigns can sue in our courts? A better exposition cannot be given than the case cited of *Hullett v. The King of Spain*. There, there had been a convention between the governments of France and Spain to indemnify Spanish subjects for wrongs sustained at the hands of the French government; and the convention secured to certain individuals the payment of a sum agreed on as an indemnity. The sum so agreed on was in the hands of an individual in England. The King of Spain sued to recover that sum, and the defence taken on demurrer was, that he was suing in his prerogative character, as representative of the nation, and for the benefit of his subjects. The ground of demurrer, which was assigned by that great master of the law, Mr. James Russell, was this, because the pretended rights claimed by the plaintiff were merely by virtue of his prerogative as King of Spain. *Mutatis mutandis*, that was precisely the argument here. It has been argued in this case, that, if this injunction be continued, there must be added to the

text-books this proposition, "That the Court will be instrumental in enforcing in England the prerogative of a foreign sovereign;" but this was the very language used on the demurrer in the case of *Hullett v. The King of Spain*, yet the Court granted relief notwithstanding, and the House of Lords took the same view. Lord Redesdale, page 175, says, "If foreign sovereigns were not allowed to sue, the refusal might be a cause of war." In page 176, he says, "I doubt if the Court of Chancery can do more than transfer the money to the King of Spain or to the agent appointed by him." That is, he is entitled to the money in his prerogative right, as representing his subjects.

In the same case, at a later stage of it, Lord Eldon said, "This is a foreign corporation sole" (a), a definition that involves this proposition, that the Court of Chancery recognises a foreign sovereign as having vested in him certain corporate rights; but what can those rights be, other than the individual rights of a foreign sovereign recognised by the law of foreign nations, and known as prerogative rights?

In the case of *The King of the Two Sicilies v. Wilcox* (b), before Lord Cranworth, on the question of production of documents, the argument was, that the ships having been purchased with money subscribed by the people, that the defendants were merely trustees, and that the documents could not be produced without the presence of the *cestui que trust*; but Lord Cranworth, in reply to the argument (c), followed in the most pointed way the reasoning in the case of *Hullett v. The King of Spain*, by holding that the *de facto* king was entitled, by virtue of his prerogative right, to assume all public property.

It follows, from these decisions, that a foreign sovereign can sue in these courts with all the prerogative rights to which, *jure gentium*, he is entitled; and that, when those

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(a) 7 Bligh, N. S. 388.

(b) 1 Sim. N. S. 301.

(c) Page 327.

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rights involve property, he can sue in respect of the property; and, unless the plaintiff's case here can be brought within that principle, it must fail.

In order to argue this case, the defendant's counsel were obliged to frame a proposition to exclude the plaintiff's right, and then had to cast about for authority to establish that proposition. With this view, Mr. Giffard had said, that, to entitle a foreign sovereign to sue in respect of property, the property must be in this country. Generally, as a matter of fact, the property was within the jurisdiction of this Court. But was there any foundation for such a proposition? Clearly none. Could not the Emperor of Austria sue a person living in England for injury done to property in Austria? Most unquestionably. Could not a private foreigner act likewise? The contrary would not be contended then; but, if so, what is there to prevent a foreign sovereign suing in our courts in respect of property not in this country?

It has been shown, then, that a foreign sovereign may sue with all the prerogative rights vested in him by the law of nations; and that, when that right regards property, he may sue in respect of that property, whether in this country or not; and the next step in the argument is, that what is called by the law of nations the *jus monetæ* is such a right. There is no pretence for the argument, that such right is applicable to one state more than to another, or is created by the municipal law of any particular state. It is a right which, in its very essence, exists *jure gentium*, and is founded on necessity. Many municipal laws are often founded on caprice, and inconsistent with justice, but the law of nations is founded on the broadest and purest principles of justice, and has its origin in the necessities that exist among civilized nations for such rights. The *jus monetæ* is one of these; because, in every civilized community, due provision must be made for the regulation of the currency. But, if the currency is a

necessity, it follows that the regulation of it must be placed in the supreme ruler of the state. The distinction between such a right as this, and that of prohibiting the introduction of the Scriptures, to which, by a fanciful analogy, it had been compared, is upon the surface: the former is a right founded on necessity, and recognised by the law of nations; the latter is the mere arbitrary exercise of power by a tyrannical sovereign.

The *jus monetae*, therefore, is a prerogative right given by the law of nations, and, whether controlled by restrictions or not, is vested in the sovereign ruler of the state. It is a right which a sovereign is entitled to exercise in his corporate capacity; it is a monopoly vested in him for the benefit of his subjects; and, if so, it is a right of property, and, therefore, comes within the definition of a right involving the property, entitling the owner to seek the protection of this Court.

The learned counsel, feeling pressed with this view of the case, contended that the right was restricted to the coining of the precious metals. [The VICE-CHANCELLOR.—I must assume that there is no distinction in this respect between paper and other money. The statute law has placed both on the same footing.] Assuming that the right to coin the precious metals is a monopoly, and that a quantity of coined money was on the point of being introduced into the dominions of a foreign sovereign, not being an alien enemy—can it be contended that the foreign sovereign could not obtain relief in this Court, on the principle, that, if once committed, the wrong would be irreparable? Assuming, from the observation of the Court, that there is, so far as the present question is concerned, no distinction between paper and metallic money, it is only necessary to add, by way of corroboration, what is related by Du Cange as happening once in France: that, by the sovereign power exercising the *jus monetae*, leather money was used—showing that the material was of secondary impor-

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tance. It is admitted that this paper is to be circulated as money. Before passing from this part of the argument, it is necessary to refer to what proved a prominent part of the arguments urged on behalf of the defendants, viz., the right attributed to the Diet. [The VICE-CHANCELLOR.—I will relieve you from that. It may be that the Royal prerogatives in Hungary, as well as in England, are subject to certain checks.] Then, in connexion with this part of the case, it may be as well to notice the arguments founded on alleged misrepresentation in the bill. The answer is, that the bill is carefully and truthfully drawn, and accurately states what the evidence proves, when it alleges that the plaintiff has the exclusive right of authorizing the issue of Hungarian notes, and to use the royal arms, even though the Diet may have the right to impose a constitutional check, and though the royal arms may be in common use. It is said, the Bank of Austria has the right, but the bank is the agent of the king, who has authorized the bank to exercise that prerogative right; just as the Lord Lieutenant of Ireland or the Prince of Wales had the right to exercise the prerogative of conferring knighthood. Perhaps, the Bank of Austria might have been plaintiffs here, but they were not necessary parties. Again, because persons used the royal arms of England on a circular or on a bottle without any one interfering to prevent it, could it be contended that the sovereign of this country has lost the exclusive right to affix them to state documents? The mere statement of the proposition carries with it its refutation.

Then, it is said, our law does not recognise foreign copyright; and a fanciful analogy is drawn between foreign copyright and the right claimed by the plaintiff; but copyright is, from its nature, purely territorial, and not extra-territorial, and therefore, where a plaintiff comes, as in *Jeffreys v. Boosey*, and asks an English Court to

maintain his right, the answer is, that right is not one recognised by the law of nations; it is not extra-territorial, and cannot be enforced in a foreign country. The like observation applies to foreign criminal law, not being part of the law of nations.

Then, if the plaintiff is entitled to the monopoly he claims, it necessarily follows that the act intended to be done will inflict damage upon that monopoly (the amount of damage is immaterial), and, therefore, the right to restrain that damage arises.

Again, as to the object alleged by the bill, it is immaterial whether the object be pecuniary gain or revolution (*a*).

On the question of the intention of M. Kossuth, his counsel have done him injustice. He never said (though he might have done so with impunity) that he did not intend to use these notes during the sovereignty of the plaintiff, but, on the contrary, he claims a right to judge of the fitting time when they are to be used. [The learned counsel read several extracts from M. Kossuth's affidavit.] Nothing could be more candid. The affidavit is a programme of what is intended to be done. Then, is there not enough to justify the interference of the Court? And here the rule of the Court in reference to trade marks, as to the time when, and evidence on which the Court will interfere may fairly be referred to. In *Farina v. Silverlock* (*b*), the Court did not say, we will wait until the

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(*a*) Mr. Josiah W. Smith, Q.C., kindly referred the reporter to the case of *Habershon v. Vardon*, 4 De G. & S. 47, in which the testator made a bequest towards the contributions, which the testator expressed his belief would be begun towards the political restoration of the Jews to Jerusalem was held void. His Honour (V. C. Knight Bruce) said, "If the gift

meant anything, it was to create a revolution in a friendly country. Jews might at present reside in Jerusalem, and if the acquisition of political power by them was intended, the promotion of such an object would not be consonant with our amicable relations with the Sublime Porte."

(*b*) 1 K & J. 409.

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labels have been issued; but the Court said, "We will stop this matter at its source." The ground on which the Court interfered there was, that the defendant was supplying the means of committing a fraud; and what makes this case stronger was this circumstance, that the Lord Chancellor thought there was an innocent purpose to which the label might be applied, and required that point to be cleared up; but he did not differ from the Vice-Chancellor as to the rule of the Court.

The arguments used by the defendants might nearly all have been urged on demurrer; but, instead of demurring, the defendants have elected to go into evidence, and have obtained time to answer. There is, therefore, a serious question to be determined on the evidence. Then, on which side is the balance of convenience? If the defendants are right, they are not seriously prejudiced; but if, on the other hand, the plaintiff is right, the mischief, if this injunction were dissolved, would be irreparable. On the ordinary ground, therefore, in cases of injunction, the Court will interfere pending the trial of the question, to prevent irreparable mischief.

It remains only to consider the argument that, because this act may be a criminal one in Hungary, this Court will not interfere. The defendant's argument is inconsistent. On the one hand, this Court is asked not to take notice of foreign law, and on the other, is invited to say that a particular act is criminal. But, even if it were clear that the acts threatened might be made the subject of criminal proceedings in Hungary, that circumstance does not oust the jurisdiction of this Court. Where, indeed, an act in England is felony, the rule of public policy does permit the party aggrieved to abandon the felony and make the subject matter of the felony the basis of civil proceedings. But that rule does not apply in cases where the act might be made the subject of criminal proceedings abroad. The reason of that is

public policy, and therefore the rule ceases with it. The case of *The King of the Two Sicilies v. Wilcox* is an authority against the principle contended for, because there the act done might have clearly been made the subject of criminal proceedings.

All the objections, therefore, fail. The threat to do the act is admitted; the balance of convenience is in favour of the plaintiff, and the motion ought to be dismissed.

Mr. *Cotton* on the same side.—The plaintiff comes here asking the Court, not to interfere as a criminal court in order to prevent a wrong, but to protect a right in the nature of property; and that observation at once disposes of the class of authorities such as that in which the Court refused to protect a book, in which, on grounds of public policy no one could be found to say he was the author. It is not disputed that, in those cases where the plaintiff has no right of property, the Court will not interfere, even though to allow the defendant to do the act complained of may lead to public inconvenience, or a breach of the peace. That foreign sovereigns have a right to sue in these courts cannot be disputed; and accordingly, the defendant's counsel have attempted to draw subtle distinctions, and contended that this Court will not regard foreign laws. [The VICE-CHANCELLOR.—Since the decision of *Martin v. Nicholls* (a), it cannot be contended that a judgment of a foreign Court is not *primâ facie* evidence of title.] In *Ffolliott v. Ogden* (b), Lord Kenyon, on appeal, doubted whether the reporter had not omitted the word “not.” If a foreign sovereign has a right, in the nature of property vested in him by the law of nations, he may sue as any foreign subject may sue in respect of any private property vested in his

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(a) 3 Sim. 458.

(b) 1 Hen. Bl. 123.

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individual capacity. That principle is determined by the case of *The King of the Two Sicilies v. Wilcox*. The Court has intimated that, in point of law, there is no distinction; that the right to regulate the paper money is included in the *jus monetæ*, and the affidavits show as a fact, that that right has been exercised by the plaintiff in Hungary, though there may be constitutional checks imposed upon it. In all transactions with foreign states, or in suits in foreign courts, the king, as a corporation, represents the right of the Crown and the rights of the subjects, and is the person and only person who can interfere to protect those rights. Then, was not the act of the defendant a violation of those rights? He admits he intends to use the notes as money, and in the seventh paragraph of his affidavit, alleges he intends to compensate the Hungarian subjects of the plaintiff for what he calls the tyrannical act of the king. It is clear, they are to be used in Hungary at some time or other, not for purposes of art, but as money. It is admitted that, while the plaintiff is King of Hungary, those notes cannot be used at all without injury to the plaintiff; but it is said, they will not be used until after the overthrow of the present dynasty. But this Court, which represents the Sovereign who recognises the plaintiff as King of Hungary, cannot assume that the event will occur; and, therefore, cannot contemplate the possibility of these notes being ever lawfully introduced into Hungary. What it really means is, that a revolution in Hungary will make the use of these notes lawful. But this Court can contemplate no such possibility as this, and therefore cannot contemplate that the use of these notes will ever become lawful. But as has been shown by Sir Hugh Cairns, the defendant never asserts what had been asserted for him: he claims the right to use these notes at his own discretion. On these grounds, the motion must be refused.

[On the suggestion of the VICE-CHANCELLOR, it was arranged that the motion should be treated as a motion (on notice) for a decree.]

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Mr. Collier replied, on behalf of the defendant Kossuth.

Mr. Bacon replied on behalf of Messrs. Day.

THE VICE-CHANCELLOR:—

The plaintiff sues in his sovereign character, as King of Hungary. He asks the assistance of the Court to prevent an injury, of a public kind, to what he asserts to be his legal rights. These rights he claims as the acknowledged possessor of the sovereign power in a foreign state at peace with this kingdom.

Judgment.

It appears that the defendants have manufactured and prepared in this country a vast quantity of printed paper, purporting to represent public paper money of Hungary, such as could be lawfully issued by the sovereign power. What they have thus prepared is intended to be circulated at some future time as the public paper money of Hungary. This paper has been thus made and prepared, not only without the licence of the plaintiff, but as in exercise of some contemplated power hostile to that of the plaintiff, and intended to supersede it.

What the Court has now to decide is the question, whether the defendants can, by the law of England, be allowed to continue in possession, or to be protected in the possession, of this large quantity of printed paper, manufactured and held by them for such a purpose; or whether, on the other hand, the plaintiff is entitled to have the right of which he claims to be in possession, protected against the invasion of the defendants, and to have delivered up to him what has been thus prepared, and made ready to be used, for a purpose hostile to his existing right.

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For the defendants, it has been argued, that this Court has no jurisdiction in such a case; that what is complained of is a public wrong, not cognizable by the law of England, because it relates merely to the public and political affairs of a foreign nation. The defendant's counsel have admitted that a foreign sovereign may have relief in this court, when he sues in his public character to recover public property within the jurisdiction of this Court. But they insist that, what is in question in this cause is not any right of property, but a mere public and political right, which, by the constitution of Hungary, is not absolute in the Sovereign, but subject to the control and direction of the Diet of that kingdom. Such a right, they say, is beyond the jurisdiction of this Court.

If the question related merely to an affair of state, it would be a question, not of law, but for mere political discussion. But the regulation of the coin and currency of every State is a great prerogative right of the sovereign power. It is not a mere municipal right, or a mere question of municipal law. Money is the medium of commerce between all civilized nations; therefore, the prerogative of each sovereign state as to money is but a great public right recognised and protected by the law of nations. A public right, recognised by the law of nations, is a legal right; because the law of nations is part of the common law of England.

These propositions are supported by unquestionable authority. In the modern version of *Blackstone's Commentaries*(a), it is laid down (and it has so always been held in our courts) that the law of nations, wherever any question arises, which is properly the object of its jurisdiction, is adopted in its full extent by the common law of England, and held to be part of the law of the land. Acts of Parliament, which have been from time to time

(a) 4 Steph. Com. 282.

made to enforce this universal law, or to facilitate the execution of its decisions, are not considered as introductory of any new rule, but merely declaratory of the old fundamental constitution of the kingdom, without which it must cease to be part of the civilized world.

To apply these acknowledged principles of the law of nations and law of England to the present case, it appears that the British Parliament, by the Act 11 Geo. 4 & 1 Wm. 4, c. 66, has enacted, that the forgery or counterfeiting the paper money of any foreign sovereign or state is a felony punishable by the law of England. This statute is a legislative recognition of the general right of the sovereign authority in foreign states to the assistance of the laws of this country, to protect their rights as to the regulation of their paper money as well as their coin, and to punish, by the law of England, offences against that power.

The friendly relations between civilized countries require, for their safety, the protection by municipal law of an existing sovereign right of this kind recognised by the law of nations. It appears from the evidence of the defendant Kossuth himself, that the present plaintiff is in possession of the supreme power in Hungary, and that the property now in question, which this defendant has caused to be manufactured in order, at some future time, to issue it as the public paper money of the State of Hungary, is not intended to be immediately used for that purpose, because of the existing power of the plaintiff. But it also appears, that the paper so manufactured is now in the possession and power of both the defendants, ready to be used, when the defendant Kossuth shall think fit, for a purpose adverse to the existing right of the plaintiff.

The manufactured paper in question, therefore, is property which has been made for no other purpose, and can be used for no other purpose, except one hostile to the sovereign rights of the plaintiff. It is not property of a

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kind which, like warlike weapons or other property, may be lawfully used for other purposes. And if the avowed and single purpose, for which this property is now in the hands of the defendants, be a purpose hostile to the plaintiff's rights, if this Court were to refuse its interference, the refusal would amount to a decision that it has no jurisdiction to protect the legal right of the plaintiff—a legal right recognised by the law of nations, and, therefore, by the law of England.

But it has been said, that the right of the plaintiff is not an absolute right, but is subject to the control of the Diet of Hungary. The prerogative rights of the Crown of England are all directly or indirectly subject to control of Parliament, and the sovereign rights in most other nations are subject to some control or limitation, yet they are not therefore the less actual rights; and it is at the suit of the sovereign that they are to be protected by the law.

Then, it is said, that the defendant Kossuth contemplates the overthrow of the existing right of the plaintiff, and that when it is overthrown, and the power transferred to himself or to some other body, which shall sanction the use of this paper as the current money of the kingdom of Hungary, he will then be entitled to use it; and therefore, that this Court ought not now to interfere.

To this argument the answer is, that this Court, like other public tribunals, can deal only with existing laws and existing governments. Obedience to existing laws and to existing governments, by which alone the laws can be enforced, are purposes essential to the distribution of justice, and to the maintenance of civil society. Therefore, if by the existing laws the plaintiff has the right which he asserts, and if the defendants have made and have now in their possession the property in question, which has been made and now is in their hands for no

other purpose than one hostile to the legal rights of the plaintiff, the legal right of the plaintiff ought to be protected by the interference of this Court. This right of the plaintiff is clear on principle, unless the Court is to abandon its protective jurisdiction. It is clear, also, upon authority. In the case of *Farina v. Silverlock* (a), an injunction was granted against a printer, who had made and printed papers which he had in his possession, merely because they might be used, and were ready to be used, in such a manner as to violate the legal right of the plaintiff, although they were not in fact actually used for that purpose.

Foreign States at peace with this country have always been held entitled to the assistance of the law of England to vindicate and protect their rights, and to punish offenders against those acknowledged public privileges recognised by the law of nations. Even the sovereign power, under a revolutionary government recognised for the time by the Crown of England as an existing government, has had its rights protected, and offenders against those rights punished by prosecution in the courts of England. The prosecution and conviction of M. Peltier, for a libel on the First Consul of France, proceeded on this principle. In earlier times, Lord George Gordon was tried and convicted for a libel on the Queen of France.

These rights of foreign powers may be for a time suppressed, and the law may be silent during the flagrance of rebellion and revolution, when rights, both public and private, are overturned and destroyed during the crimes and calamities of civil war.

But where, as in the present case, the existing rights of the plaintiff, as Sovereign of Hungary, are recognised by the Crown of England, the relief which he seeks in this

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(a) 1 K. & J. 509.

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cause, is for the protection of a legal right of universal public importance against the acts of the defendants.

That protection can only be effectually afforded by the relief prayed for in this suit; and there must be a decree against the defendants, according to the prayer of the bill.

Sir Hugh Cairns.—In the case of *Hullett v. The King of Spain*, the House of Lords said they would not disparage the dignity of the plaintiff by giving him costs. I must accept the same rule in this case, on behalf of the Emperor of Austria.

The VICE-CHANCELLOR.—Certainly.

1858.

Dec. 21st &
22nd.

ARCEDECKNE v. KELK.

THIS was a motion for an injunction to restrain the defendant, his workmen, &c., from erecting a proposed or any building which should have the effect of depriving the owner or occupier of the house, No. 1, Grosvenor Square, from enjoying the same amount of light and air as she had hitherto enjoyed without interruption by the owners of No. 2 in the same square.

The bill stated, that the house, No. 1, Grosvenor Square, occupied by the plaintiff, Mrs. Arcedeckne, had a yard behind it the full width of the house, and measuring twenty-seven feet three inches in depth; that several of the rooms at the back of the house were lighted exclusively by windows looking into this yard.

That, previously to the alteration complained of, the back of the house No. 2 was in the same line and even with, the back wall of No. 1, and had been so for upwards of twenty years.

That, in November, 1858, the defendant had pulled down the house No. 2, and had commenced rebuilding the same on such a plan, as that the back wall and bow would project ten feet beyond the former line of the building.

That, but for this projection, the side of the yard of No. 1 would be wholly open, as it had been previously, and that the side of such yard formed the only lateral source and access of light and air to the rooms in the back of No. 1.

That the proposed building would partially close the side of the yard of No. 1, and exclude a considerable amount of light and air, and would thereby destroy the comfort of the plaintiff, and seriously injure the market-value of the property.

A plaintiff, who in an insignificant degree obscured the light and air to his own dwelling—*Held*, not thereby disentitled to an injunction to restrain the defendant from erecting a building so as seriously to diminish the supply of light and air.

Nothing short of an act by the plaintiff which will produce somewhat the same amount of injury as that of which he complains, will deprive him of his right to relief in this Court.

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There was a great deal of conflicting evidence.

The plaintiff adduced the evidence of architects and surveyors to prove the allegations in the bill.

The defendant adduced evidence to show, first, that the projection was nine feet, and not ten as alleged; and secondly, that it did not sensibly affect the plaintiff's enjoyment, but that a flue which the plaintiff herself had, and which the evidence showed to have been two feet broad and eighteen inches in depth, created the same obstruction.

It was also contended, that some trees in the defendant's premises, which he had recently cut down, had obscured the light and air as much, if not more, than the proposed building.

Argument.

Mr. *Malins* and Mr. *Cutler* appeared for the plaintiff.

Mr. *Bacon* and Mr. *G. M. Giffard* appeared for the defendant.

[*Blanchard v. Bridges*(a), *Cotterell v. Griffiths*(b), *Martin v. Goble*(c), and *Garritt v. Sharp*(d), were cited.]

Judgment.

THE VICE-CHANCELLOR:—

It is certain, that, before the intended building of the defendant's was contemplated, the back wall of his house was in the same line as the back wall of the plaintiff's house, which contains the windows in question. These windows, it is alleged, will be darkened if the intended building be made in the manner proposed. Instead of rebuilding the wall in a direct line with the back wall of the plaintiff's house, the defendant intends to advance at right angles to the wall to an extent, he says, of three feet nine inches (the plaintiff says to an extent of four feet nine inches), and at the extremity of these four feet nine inches, instead of a wall at right angles in a straight

(a) 4 Ad. & E. 178.

(b) 4 Espin. 60.

(c) 1 Camp. 320.

(d) 3 Ad. & E. 325.

line parallel to the back wall of the plaintiff's house, he proposes to erect a bow, the result of which would make the furthest projecting point of the bow window ten feet, according to one of the plans, and I think certainly according to all the plans at least nine feet. It is clearly proved that the windows sought to be protected look into a small back area only twenty-seven feet wide. The question is, whether advancing the wall to the extent proposed, with the bow, which would make a projection to the extent of nine feet in an area only twenty-seven feet wide, will produce such a diminution in the quantity of light and air as materially to affect the comfort and enjoyment of the plaintiff's house. As to the speculations on the degree to which the amount of light and air will be affected, there is very contradictory evidence. One of the defendant's witnesses goes so far as to swear that the effect of the proposed building will be that the plaintiff's house will be better supplied with light and air than it had ever been before. Any man of common sense must see, that the supply of light and air to this house from an area only twenty-seven feet wide must be sensibly diminished by a projection of the building so extensive as is proposed by the defendant. As to the argument, that the plaintiff had herself by building a flue so far obstructed the light and air by her own act as to have lost the right to complain of the building about to be erected by the defendant, it was proved that the dimensions of the flue were comparatively insignificant. According to the principle stated by Lord Kenyon, nothing short of an act on the part of the plaintiff which created an obstruction somewhat to the amount of that which was complained of, could deprive a plaintiff of the right to an injunction. It is proved that the flue was only two feet wide and eighteen inches in depth and was a trifling obstruction compared with the dimensions of the defendant's intended building.

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This seems too insignificant an obscuration of the light to affect the plaintiff's right to relief. The plaintiff is, therefore, entitled to an injunction, but the defendant is entitled to put the plaintiff to bring an action at law.

It was ultimately arranged that the plaintiff should undertake to bring her action within a month.

1859.

Nov. 16th,
 25th, & 27th.

HERZ v. THE UNION BANK OF LONDON.

The lessee of a dwelling-house in which he carried on business as a diamond merchant—*Held*, entitled to an injunction restraining the owners of premises adjacent (who afterwards purchased the reversion of the plaintiff's house) from constructing the party-wall, which they were about to rebuild so as to occasion such an obstruction of the plaintiff's ancient lights, however slight, as would injure him in his business.

THIS was a motion for an injunction to restrain the defendants from raising the party-wall between the premises of the plaintiff and the premises of the defendants, and from adding to or rebuilding the same, or any other wall or buildings adjoining the plaintiff's premises, to a greater height than that of the old party-wall and adjoining buildings of the defendants before the same were pulled down, and from continuing the erection or building already raised upon the site of the stable buildings or other parts of the defendants' premises, and from erecting or building upon the site thereof any wall, building, or erection of a greater height in any part thereof than the elevation at the same point of the old buildings, as they lately stood thereon, so as to darken, or obscure, or impede the light and air theretofore enjoyed by the plaintiff, and from building in such a way or doing any act whereby the plaintiff's light might be darkened or obscured, or the free admission of light and air be prevented or obstructed.

This Court will interfere to restrain

apprehended injury, where it is clear the act intended to be committed would injure or destroy a clear legal right.

house and premises in Argyll Street, Oxford Street, where he had for many years carried on the trade or business of a diamond-merchant and dealer in paintings and articles of vertu; that on the 4th of January, 1854, he became the lessee of the said house and premises for a term of twenty-one years, commencing from the 25th of December, 1850, at a rent of 150*l.* per annum; that on the basement of the said house, and in the rear thereof, there was constructed a room or vault, being part of the premises demised to the plaintiff, extending beyond the upper external wall of the said premises fifteen feet or thereabouts, in a westerly direction, under the adjoining premises in the occupation of the defendants; that, on the ground-floor of the plaintiff's house, and at the back thereof, was the plaintiff's dining-room, which was also used by him in his business of a diamond-merchant and dealer in paintings and articles of vertu, and that he had many valuable paintings hung there for sale; that for the purpose of his business it was essential to the plaintiff to have a clear and powerful light; that the windows of the dining-room overlooked to the west the lead flat or roof underneath, which was the plaintiff's kitchen; that such kitchen was lighted by a skylight in the said lead flat or roof, and the said lead flat or roof was bounded on the west by a party-wall, eleven feet two inches from the lead flat or roof over the kitchen, and that the distance of the party-wall from the windows of the plaintiff's dining-room was twenty-one feet; and there was projected over the premises of the defendants, in a westerly direction from the said wall and on the level of the said lead flat or roof, a closet three feet deep by seven feet ten inches wide, being also part of the premises demised to the plaintiff. The bill alleged that the plaintiff's house and premises had been built sixty years and upwards, and the said skylight in the leaden roof or flat, and the said dining-room windows, were ancient lights, and the access

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of light thereto was over the said party-wall eleven feet two inches high; and the adjoining buildings of the defendants, as they stood before the alteration herein-after mentioned, were built for and were used as stables, and the roof thereof inclined to the said wall, but not so as to obstruct the light which passed over the said wall; and if the said party-wall or the adjoining buildings of the defendants should be raised beyond the height thereof respectively at the time such wall and buildings were removed, as hereinafter mentioned, the light admitted into the said dining-room and kitchen of the plaintiff would be greatly diminished, and the access of air to the plaintiff's premises would be greatly obstructed.

That on the 17th of April, 1854, the defendants, who were the owners and occupiers of the adjoining premises, gave notice that they intended to rebuild the party-walls and buildings, and to have them surveyed under the Metropolitan Building Act; but they intimated that, in the event of the said party-structures not being found absolutely necessary to be pulled down, the defendants nevertheless intended to do so, and to erect in their place party-structures and walls, which were not stated in terms but which were alleged to be according to certain drawings and plans contained in the said notice, and which showed that the party-wall would be raised to the height of eight feet ten inches thereon. The plaintiff alleged that if such walls, &c., were carried up according to such plans and sections, to the height thereby represented, the effect would be to darken in a very material degree the plaintiff's dining-room and kitchen, and the offices connected therewith, and to render the dining-room useless to the plaintiff in his said business of a diamond-merchant and dealer in paintings and articles of vertu; and, in fact, for the purpose of his business as a

diamond-merchant, it was not only important to the plaintiff to have sufficient direct solar light in his dining-room, but it was necessary that such light should enter the room at an angle not less than that at which it had previously fallen over the old party-wall, and that it was impossible to judge of the quality or water of a gem if the light did not fall upon it in a proper direction ; and owing to the great value of the articles, and the difficulty of estimating their purity correctly, the plaintiff would be subjected to great risk in the purchase of gems under an imperfect or insufficient light, and the slightest mistake in estimating the purity of a gem might subject the plaintiff to great pecuniary loss ; and his dining-room was the only room in his house in which he enjoyed a proper light for his business, and if diminished or obstructed, his business of a diamond-merchant could not be properly or safely carried on there, and the chance of selling his pictures and articles of vertu would be nearly, if not wholly, destroyed. The bill further alleged, that the right to the light and the air enjoyed by the plaintiff, as the lessee and occupier of the house and premises, was an ancient right demised to the plaintiff as appurtenant to the house and premises, and that he was entitled to their enjoyment unobstructed and unobscured, such light and air being absolutely necessary to enable him to carry on his business or trade of a diamond-merchant and dealer in paintings and articles of vertu. The defendants' affidavits stated, that the proposed new building, which would exceed the height of the old one, was only a skylight.

A long correspondence ensued between the solicitors of the respective parties, which, however, ended in this bill being placed on the file, and a motion made for an injunction, which, however, his Honour, on the 16th of November, refused, on the ground that, in consequence of the change in the defendant's plans, the injury complained of

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in the original bill was of a solid obstruction, but the evidence showed the intended erection was a skylight; but his Honour gave leave to amend the bill. The bill was accordingly amended by adding apt allegations to meet the case, and as amended alleged that the defendants now intended, at the distance of twenty-four feet from the plaintiff's house, to raise the new buildings higher than the old ones; that at the distance of thirty-four feet from the west side of the plaintiff's house it was intended to raise the new buildings three feet higher, and at a distance farther off it was intended to raise them five feet higher than the old buildings stood; and that in their proposed new buildings, which exceeded the height of the old buildings, there would be in part a skylight, raised upon iron girders and ribs, covered with a flat roof of lead, or some other material impenetrable by the light, which would diminish the light and air of the plaintiff. The defendants subsequently purchased the house and premises of the plaintiff, subject to the lease, in which the plaintiff was described as a diamond-merchant. On the 25th, the motion was renewed by special leave of the Court.

Argument.
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Mr. *Bacon* and Mr. *Greene* appeared for the plaintiff.

Mr. *Malins* and Mr. *Eddis* appeared for the defendant.

[The following cases were cited:—*The Attorney-General v. Doughty* (a), *Martin v. Goble* (b), *Bealey v. Shaw* (c), *Wright v. Howard* (d), *The Attorney-General v. Nichol* (e).]

Judgment.
 —

THE VICE-CHANCELLOR:—

The plaintiff by his evidence proves his enjoyment of an ancient light. The obstruction sought to be restrained is only a contemplated obstruction; but, upon the weight

- (a) 2 Ves. sen. 453.
- (b) 1 Campb. 320.
- (c) 6 East, 208.

- (d) 1 S. & S. 190.
- (e) 16 Ves. 338.

of evidence, there seems enough to show that there will be some obstruction. The right to an ancient light depends, as Lord Eldon has observed, upon an implied contract. There is evidence which goes to prove, that the smallest diminution or alteration in the light admitted through the window in question will be a serious injury to the plaintiff in his business of a diamond-merchant. But it is said that this is an ancient light in a dwelling-house; and an authority has been cited to show that the defendants are entitled to obscure or diminish the light to such an extent as would not interfere with the enjoyment of a mere dwelling-house. The case referred to certainly supports the proposition that, where the character of a building is altered to that which requires a greater quantity of light, the owner of adjoining land has a right to erect any obstruction which would not obstruct the light to an extent sufficient to injure it in its former state of enjoyment before the alteration. The principle of that decision is, that no man is entitled by any act of his own suddenly to impose a new restriction on his neighbour; but the application of that principle was to a case where no right of personal enjoyment was interfered with, and where the plaintiff did not even state who was in possession, but merely complained of an injury to his inheritance, and not to himself.

The present case is of a different kind; the defendants are the owners of the reversion, and the plaintiff is described in the lease as a diamond-merchant.

There seems to be no sound principle on which, where the demise of the house is to a person known to sustain such a character as that any diminution of the light would disturb his enjoyment in that character, the reversioner can be allowed to withdraw or obstruct anything necessary to his enjoyment of the demised property in that character.

It is proved that there will be an obstruction and diminution of the light. But an attempt has been made to

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show, that there will be no obscuration of the direct light which comes to the upper part of the window. If there be any obscuration at all, it must interfere with the plaintiff's enjoyment; and upon the evidence it is perfectly clear that there will be an obscuration of the light, though only to a small extent. It is shown that the lights diminished by the rising of the party-wall will be one-sixth near the window, more than three-eighths in the centre of the room, and fully one-half at the other side of the room. Pending the litigation, the plan of the defendants has been materially altered, but as it now stands it is clear that there will be some obscuration. I have been pressed by the defendants to consider that this is a case in which the plaintiff proceeds upon mere apprehension of an injury, and that the Court ought not to interfere till there is proof of an actual injury. But this Court interferes by its injunction to prevent injuries where there is sufficient evidence that the act sought to be restrained would, if committed, injure or destroy a clear legal right.

1856.
May 5th &
6th.

A mortgagee who holds property in pledge is responsible for it in its integrity; therefore a mortgagee of lands containing underneath unopened coal-fields, who allowed the owners of adjacent coal-mines to explore and work the coal, on a bill filed by the mortgagor against him and such coal-owners, was held responsible; and, besides the common decree, the Court directed an account of all coal worked by the defendants, or either of them, and of the proceeds thereof.

HOOD v. EASTON.

THIS bill was filed by Peter Hood, who was part owner of certain freehold land and hereditaments at Windmill Hills, near Gateshead, and the mines and minerals thereunder, for redemption of the property and for an account.

The plaintiff, in April, 1834, mortgaged the property to Robert Leadbitter, to secure 3000*l.*; and, on the 1st of

August, 1845, he executed a second mortgage to Robert Leadbitter of the same property, including a further share therein which he had acquired subsequently, to secure 1200*l.*, and he thereby covenanted to confirm any lease or leases which R. Leadbitter should make; but, as the bill alleged, R. Leadbitter had no authority to work or lease the mines.

The bill alleged, that the plaintiff had accidentally discovered that Thomas and James Easton, who were the lessees of coal-mines under lands adjacent to that of the plaintiff, had abstracted coal in such a way that the buildings on the plaintiff's land had been rendered unsafe. The bill alleged, that Robert Leadbitter, the mortgagee, had never made any application or given any notice of his intention to let or work the coal; that the defendants Easton never accounted for the coal or any rent or royalty respecting the same. The bill further alleged, that the defendant Leadbitter had stated that he had not authorised the Eastons to work the coal, but that the Eastons had applied to him for leave to do so, when he said he had no objection provided it was done under the inspection of a Mr. Taylor.

The plaintiff, in 1845, employed two colliery viewers to inspect the coal, who made a report by which they calculated the damage done to the plaintiff at the sum of 3445*l.* 10*s.* On the 28th of November, 1845, the plaintiff's solicitor made a demand on the defendants of that sum, and shortly afterwards the sum of 784*l.* 12*s.* 6*d.* for the coal which had been ascertained to have been made incapable of being worked by the working of the defendants Easton.

The bill alleged that Robert Leadbitter had never been in possession of the property or interfered in its management; and that the land and hereditaments were ample security for the amount due, independently of the mines and minerals; and that the plaintiff was ready and thereby offered to pay what, on taking an account of the said

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mortgage, should be found due. The bill further alleged, that the defendant Robert Leadbitter refused to institute proceedings against the defendants the Eastons in respect of the working of the coal.

The bill charged, that Robert Leadbitter had no right to work or lease the coal; but that even if he had such right, he ought not to have allowed any person to explore or work the coal without previously binding them by proper and formal agreements to work and get the whole of the coal in a proper manner, or to pay the usual rents for the same; and that, in consequence of the mode in which the coal had been worked, the plaintiff could not derive any benefit from that coal which had been left unwrought; and that there was no occasion for the defendants the Eastons to explore the coal, inasmuch as they were lessees, and in possession of all the coal surrounding it, and had worked the same up to the boundary of the said nine acres, and knew the nature and quality of the coal; and, in fact, what they did was to work and not explore the coal.

The bill charged, that the plaintiff was ready to pay what, if anything, was due to the defendant Robert Leadbitter; but that, in taking an account, Robert Leadbitter ought to be charged as mortgagee in possession for his wilful neglect and default in working the coal, and that he ought to allow the full value of such coal which had been worked, and for the damage to the remainder of such coal. The bill also prayed, that an account might be taken of what was due to Robert Leadbitter on the mortgage; and that the plaintiff might be allowed to redeem the hereditaments and premises; and further, that, in taking such account, an account might be taken of the coal worked or gotten by the defendants Thomas Easton and James Easton from or under the land of the plaintiff, and of the sums of money produced by the sale thereof, and of the damage done to

the surface and the remainder of the coal; and that they or the defendant Robert Leadbitter might be ordered to pay the same to the plaintiff, after allowing what was due on the mortgage. The bill also prayed for an injunction to restrain the defendants from working or getting any more coal from or under the land; and that the defendants might be ordered to stow or fill up the spaces from which the coal had been worked or gotten, and also to erect all proper walls or barriers to support the roof of the mine and the surface of the land; or that the amount of the damage of the surface by the working the coal might be ascertained, and paid or allowed by the defendants to the plaintiff.

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The defendants the Eastons by their answer stated that, in 1845, they were absolute owners of the coal-mines surrounding that of the plaintiff. That being anxious to explore the coal, they applied to a Mr. Swinburn, since deceased, for information, by whom they were referred to Robert Leadbitter, whom they believed to be mortgagee of all the Windmill property. Some negotiation took place; and, as the defendants alleged, Robert Leadbitter ultimately agreed to allow them to work the coal on payment of such rent as a Mr. Hughes and James Easton should determine. That, relying on this agreement, they commenced exploring the Windmill Hill coal-mines in February, 1846, and continued to do so till June, 1857, when they abandoned it finally, in consequence of the coal proving to be of very inferior quality, and also deteriorated by numerous slips, &c., and other faults arising in the seams, the effect of which was, in some places, to destroy the value of the coal and render it unprofitable to work.

The defendants alleged, that the expense of working or exploring the coal exceeded the proceeds of that portion which had been sold.

Robert Leadbitter alleged, that by his agents he had

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held the hereditaments comprised in the mortgage; that there was due on the mortgage 4200*l.*, which was nearly the value of the hereditaments; and that, under these circumstances, he insisted that he was entitled to have the coal explored.

It appeared from the evidence, of which there was a great deal, that the plaintiff's mines had no shaft or pit sunk so as to admit of their being worked from the surface.

There was a good deal of conflict in the evidence.

The defendants, *inter alia*, relied on the Statute of Limitations.

Argument.
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Mr. *Malins* and Mr. *Bates* appeared for the plaintiff.

Mr. *Bacon* and Mr. *Toller* appeared for the defendants the Eastons.

Mr. *Wigram* and Mr. *Riddell* for the mortgagees Robert Leadbitter.

[The following cases were cited:—*Martin v. Porter*(*a*), *Morgan v. Powell*(*b*), *Wild v. Holt*(*c*), *Sibbering v. The Earl of Balcarras*(*d*), *Granger v. George*(*e*), *Short v. Macarthy*(*f*), *Denys v. Shuckburgh*(*g*), *Briggs v. Earl of Oxford*(*h*), *Sandon v. Hooper*(*i*), *Acton v. Blundell*(*k*), *Hughes v. Williams*(*l*), *Thorneycroft v. Crockett*(*m*).]

(*a*) 5 M. & W. 351.

(*b*) 3 Q. B. 278.

(*c*) 9 M. & W. 672.

(*d*) 3 De G. & S. 735.

(*e*) 5 B. & Cr. 149.

(*f*) 3 B. & Ald. 626.

(*g*) 4 Y. & C. 42.

(*h*) 3 De G. M. & G. 363.

(*i*) 6 Beav. 246.

(*k*) 12 M. & W. 324.

(*l*) 12 Ves. 493.

(*m*) 10 Sim. 445.

THE VICE-CHANCELLOR:—

This is a bill by a mortgagor to redeem the mortgaged property, and it seeks for an adjustment of the accounts between the plaintiff and his mortgagee on the footing of the contract between them. In this Court, a mortgagee, who holds property in pledge, is accountable for it in its integrity. If he assign the mortgage without the concurrence of the mortgagor, he is still accountable for it as if it had remained in his possession, and in this Court is regarded as holding it subject to the mortgagor's right to redeem on satisfaction of the debt for which it was pledged. If the mortgagee has so dealt with the mortgaged property, that part of it is in his own possession and part in the possession of other persons, the mortgagor, in order to redeem, is entitled to bring before the Court those persons to whom the mortgagee has parted with the property.

In this case, the mortgagee has allowed a part of the property conveyed to him to be abstracted by other persons, so that it has become impossible for the mortgagor ever to get back in specie what has been thus abstracted. He can only get the value. It must be observed, that the right to work the mine did not pass, nor even the mine, except as part of the freehold; but still the mortgagee had dominion over the entirety of the freehold comprised in the mortgage-deed.

It has been contended, that the defendants Easton are unnecessary parties to the suit; but, on the principle on which this Court acts, there is little difference between the mortgagor's right against the mortgagee himself and the alienee of the mortgaged property who claims under a title from the mortgagee without the concurrence of the mortgagor, and whom the mortgagor finds in possession of the proceeds of a part of the property which he has converted. In either case the mortgagor's right is to get back the mortgaged property—or the value of that

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 —
Judgment.

converted, to be estimated on a just principle—on satisfaction of the mortgage. In this case, the value does not appear to have been received by the mortgagee, but has been received and is still retained by the defendants Easton. It has been contended, that this claim is barred by the Statute of Limitations; but to apply the Statute of Limitations to a case of this kind would be to contravene the principle on which this Court acts as between mortgagor and mortgagee.

On these grounds, it appears to me that the defendants Easton are properly parties to this suit. It has been contended, however, on the part of the defendant Leadbitter, that, in taking the account, he ought not to be charged in respect of that portion of the mortgaged property which has come to the hands of the defendants Easton, who have, it is said, violated the plaintiff's rights and exceeded the authority given them by the defendant Leadbitter in such a way as that he cannot be justly held accountable for any misfeasance by them which transgresses the agreement between himself and them.

On the view of the evidence most favourable to the case of the defendant Leadbitter, it must be taken as proved that he allowed them to enter, explore, and work, for the purpose of exploring the mine without the concurrence of the mortgagee. What he says is, "They applied to me to grant permission to work or explore the mine;" and his reply to that application was, "that they were to be at liberty to work the coal for the purposes aforesaid." The most favourable construction of that language is, that they were to be at liberty to work the coal for the purpose of exploring it.

But, whatever may be the right construction of the arrangement among the defendants, the transaction is beyond doubt a transaction between the mortgagee and one a stranger to the mortgagor, by which the mortgagee, exceeding the rights conferred on him by the mortgage-

deed, professed to allow a stranger to the mortgagor to enter into possession of the mortgaged property, and to inflict a serious injury on the mortgagor by the abstraction and sale of a part of the coal.

Upon the principle on which this Court adjudicates as between mortgagor and mortgagee, the mortgagee who allows a stranger to deal with the mortgaged property is responsible to the mortgagor in this Court for any damage that may accrue by reason of such dealing. It would be impossible, therefore, to work out a redemption decree without giving to the mortgagor an account, so as to enable the Court to estimate the value of that part of the abstracted part of the property which has been sold, and can no longer be restored in specie.

That was the principle of the decree in the case of *Thornycroft v. Crockett*, to which reference has been made.

It is contended, that—even assuming the Eastons who wrought and won these coals, and sold them, and received the price, are accountable to the mortgagor—on the authority of decisions at law, they ought not to be charged with the gross amount received for such coal, but ought to be allowed the cost of working, and getting, and of conveying them from the bed to the pit's mouth, where they were sold.

At law, it is the province of the jury to assess the damage; and from the reported decisions it would seem that the question, whether the expense of severance and the expense of carrying them from the place of severance to the place of sale should be allowed, depends on the conduct of the parties. It has been argued, on the authority of *Martin v. Porter* and *Morgan v. Powell*, that the costs of severance are not to be deducted, but only the costs of conveyance of the coal as a chattel to the pit's mouth; but in *Wood v. Morewood(a)*, from the circumstances of

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—
Judgment.

(a) 3 Q. B. 440.

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conduct, the cost of severance was not allowed. The conclusion to be deduced from that case is, that the conduct of the party, circumstances of the case, and even the form of the action, enter into the judgment of the Court in directing the jury to estimate damages.

But, in this Court, where a mortgagor seeks to get back the estate which he has pledged, but which in fact the mortgagor cannot restore, a different principle must prevail.

In the case of *Thornycroft v. Crockett*, the mortgagee was in possession; he opened the mines without authority, and having worked the coal, he claimed, as is claimed here, to be allowed at least the expense of conveying the coal to the surface; he claimed further to be allowed, on the authority of the decisions at law, some of the expenses of working and winning the coal. But he was charged with the full value of the coal, and was made to refund to the mortgagor the whole amount which he had received for the coal, without being allowed any part of the working expenses.

This is a first principle in a case where the mortgagor seeks to redeem the mortgaged property, which, however, cannot be restored. In such a case as here, the conversion, the working, and the sale of the property, are wholly unauthorised by the mortgage-deed. In such a case, where the mortgagee has put it out of his power by a series of wrongful acts to restore the property in specie, the Court always holds him responsible, as in the case of *Thornycroft v. Crockett*.

It is said, however, that that case does not apply here, because the Vice-Chancellor of England made the order in that case on the ground that he was bound by the form of the decree. But that view does not appear to be well founded, for the Vice-Chancellor goes on to say, that what was sought to be restored was the money produced by the sale of the freehold that was actually sold.

Upon the whole case, having regard to the position of the plaintiff coming, as mortgagor, to have the pledge restored on an adjustment of his equitable rights—and at the position of the defendants Easton, who, by the wrongful act of the mortgagee, acquired and abused their power over the mortgaged property—I must hold them all liable to the mortgagor. It has been said, on behalf of the defendant Leadbitter, that the bill asserts that he was not mortgagee in possession. This is quite true; but the bill also asserts most clearly, that the defendant Leadbitter had authorised the defendants, the Eastons, to work the mine, provided it were done under the inspection of Mr. Taylor; and this statement tallies precisely with the answer of the Eastons. The mortgagee, therefore, must be held responsible for these wrongful acts. It would be impossible to do justice between the mortgagor and mortgagee without giving the mortgagor the value of the abstracted property.

There must be the common mortgage decree and mortgage account, and a further account of the value of all coal belonging to the plaintiff wrought and won by the defendants, by the order, or for the use, or by the permission of the defendants, or either of them. An account of all monies received by the defendants, or any or either of them, or for their use in respect of the said coal.

The claim for damage to the surface of the land has not been made out.

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—
Judgment.

APPENDIX.

KINGSFORD v. BALL.

March 13th,
1852.

IN this case the cause came on for further consideration, in which the only question was the costs. It was contended, on behalf of the defendants, that it was a new point that a contract for sale severed the joint tenancy.

Mr. Malins, Mr. Bacon, Mr. W. D. Lewis, and Mr. Kanyon were the counsel engaged.

As Lord St. Leonards' judgment (dismissing the appeal) appears never to have been reported, the reporter has thought it right to add the shorthand notes of his lordship's judgment.

THE LORD CHANCELLOR:—

Judgment.

I think there is no doubt how it stands. I take the facts to be these:—The father and the son bought the estate, and had it conveyed to them both as joint tenants; there is no doubt about that. Afterwards, by a subsequent deed, they settled the estates in rather a singular way, by giving the father a power of appointment by way of sale only, which power to be exercised was not to be for the father's benefit alone, but the purchase-money was to be divided equally between the father and son, subject to that settlement—settling the estate in effect upon the son in fee, because they give it to the usual uses to bar dower, the father taking the previous life estate; so that, if the estate had descended, no doubt under that deed the father would have been tenant for life and the son tenant in fee. They enter into a contract. I think it quite clear upon the face of that contract, that they treated themselves as still claiming under the original deed, and therefore it was that I called for the abstract, in order to see whether they had suppressed that deed which created the power of sale. The learned judge in the court below believed, as he had reason to

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believe, as the case must have been opened to him, that the sale was under the power. That was his opinion; but the power was actually kept back from the knowledge of the parties, and the seller, therefore, did not profess to deal under that power.

Well, then, the sale took place, and upon that sale the parties received (the father and the son) 10,000*l.*, being a fifth part of the purchase-money. Now, in the first place, however, they might keep back the deed of 1842; that deed of 1842 had severed the joint tenancy, and left them as tenants in common, at all events, either bound or not bound by that deed of 1842, as they might or not be enabled to establish it; but they chose to keep it back. If the joint tenancy was severed, as clearly it was, by that deed, the thing was transferred to the new uses. Then if I look to the effect of the contract, which rather points to a joint tenancy—the contract for sale subsisting between the father and the son—I find the 10,000*l.* not divided as a property which was to go under the deed of 1842, the father taking the value of the life estate, and the son taking the value of his remainder, and therefore dividing the estate in those proportions; but I find the 10,000*l.*, as stated by themselves, to have been received and applied between themselves.

Mr. *Kenyon*.—That would have been consistent with the deed of 1842.

THE LORD CHANCELLOR.—That would not have been consistent with the deed of 1842, unless the sale had been under the power; it would have been inconsistent with it; it would have been inconsistent with the power of sale; and if it had been under the power of sale, they having purposely withheld that deed, I see no doubt of this, that I have before me the original deed of 1836, by which the joint tenancy was created; and upon

the very deed is endorsed a memorandum of the contract for sale, which is upon this deed as operating upon this title, and having no reference whatever to the deed of 1842; and when the abstract was furnished, as the answer shows, and as it has been stated to me when the abstract was furnished, that deed of 1842 was not contained in the abstract; the parties, therefore, were dealing upon that original title, and the contract must, I think, be considered to be a contract upon that title. The contract was operative as a severance. The parties by that contract show that they intended to sever; for the money was equally divided between the father and the son, and was not left to any contingency or used in any manner to give any right of survivorship.

Well, then, the man who bought, Potter, became incapable of performing his contract, and ultimately a petition was presented by the father and the son in bankruptcy, calling upon Potter's assignee, under the Act of Parliament, to elect whether he would abide by the contract or not. The assignee fixed [1800]. as a sort of sum to have further time allowed him to elect.

Mr. Kenyon.—It was not paid, my lord.

THE LORD CHANCELLOR.—I am aware of that; but he agreed to pay it. He paid that for the liberty to continue to have a right of election; and the Court, therefore, made an interim order, and it reserved it at the conclusion, and ordered that the petition should stand in the paper of petitions for hearing upon a certain day to come, so that the Court reserved the right of dealing with that petition.

Now, I take it to be quite clear, that the parties were competent, with the assignee, to get rid of this contract if they pleased behind the back of the Court; there is no doubt of that, though they had in that petition re-

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—
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served the matter. It was not necessary to hear it in court; they have a right under the Act to proceed in bankruptcy, but there is nothing to prevent a party competent to deal with that. But it is a circumstance that the matter was pending before the Court; and then comes this transaction, that a paper was signed by the creditor's assignee and by the official assignee in bankruptcy, and there was written at the end of the original contract—this is the original contract—"We, the undersigned, being the creditor's assignee and official assignee of the estate of the within-named William Potter, a bankrupt, having been required by the within-named James Ball the elder, and James Ball the younger, to elect whether we would abide by and execute the within-written agreement or abandon the same, do hereby refuse to abide by and execute the same; and we hereby abandon, renounce, and agree to cancel the said agreement; and we authorise and empower the said James Ball the elder and James Ball the younger to take immediate possession of the hereditaments and premises comprised in the said agreement with the church, and all other erections and improvements thereon." That is dated the 15th of September, 1848, and is signed only by the official assignee and by the assignee in bankruptcy. But contemporaneous with that is a memorandum, signed by the younger Ball only and not by his father, in these words, evidently a part of the same transaction; and I am bound to look at those two instruments as the contract which was entered into on the 15th of September in that year between these parties. Now, this being signed, that bound only the parties who signed it, namely, those who represented the bankrupt. Now the son, assuming to act with regard to the estate, enters into this contract: "In consideration of your consenting to cancel the contract entered into between my father and myself and the bankrupt for the sale of an estate, situate in the townships of

Cloughton and Birkenhead, in the county of Chester, I agree to forego all claim for interest now due in respect of the said contract; and I empower you to remove, within three months from this date, all bricks made by the bankrupt on the said estate and now standing thereon."

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—
Judgment.

The son, therefore, assuming to act, accepts this renunciation, and gives certain benefits, which I dare say they were entitled to—as has been stated by counsel, and which I have no doubt is accurate, as I shall always take gentlemen's statements at the bar to be—they were entitled to the bricks, and they give certain facilities respecting this transaction. The son then says, that the effect of this is to give him the estate as discharged from his father—a right as a tenant in common under this contract, supposing the contract to have severed the joint tenancy. Now, it is admitted, if the contract remained, that it would sever the joint tenancy; that is admitted at the bar, and the effect of the receipt of the 10,000*l.* and the division of the money shows that that was the view of the parties. I consider the parties here to have decided themselves to act upon their original title; that they sold the estate under that original title; that the case is altogether different to what it was before the learned judge in the court below; but I think that that difference amounts to this, that it removes all difficulty which might have existed; for if the question had been whether the sale was to operate under the deed of 1842 as an exercise of the power in the father, the father and son both having joined in the contract, or as an exercise of this right of the father and the son in respect of their actual estates under the deed of 1842, a case of very considerable difficulty would have arisen; and whether the creditors could have followed the estate here would have been a case, in my mind, requiring consideration; but as the facts now appear, it appears to me to require no consideration, for it is the simplest case that could arise. The parties under

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the deed of 1842 have not asserted their title upon it—they could not have intended to assert their title upon it, and that question could not arise—but they could not have intended to sell upon their title, because they chose to fall back upon their other title, and this contract operated as a severance, and they meant it to do so; and the father not having done any act to rescind the contract, but the act having been done by the son alone without the slightest authority being shown on the part of the father, it was a contract which bound both father and son, and was to benefit the father and son; and the son, without the power of the father, has taken upon himself to rescind that contract, of which he would now claim the whole benefit. I consider it is not the law of this Court that that contract is binding upon both the parties, unless they had thought proper to rescind it. This is an arrangement by the son behind the back of the father, and therefore I think this appeal must be dismissed, though the facts are different to what they were in the court below.

Mr. *Rolt*.—I apprehend your lordship dismisses the appeal with costs.

THE LORD CHANCELLOR.—I do not know what to say about that; I do not think the facts were fairly before the learned judge in the court below.

Mr. *Rolt*.—I think your lordship will see this is the case we made by our bill. Your lordship sees in one of two ways we are right; throughout we have insisted *quâcumque viâ* we were right; we meant to contend before your lordship that *quâcumque viâ* we were right in one of two ways.

THE LORD CHANCELLOR.—I see the Vice-Chancellor

was not aware of the circumstance to which I have referred. It is clear from his judgment that he considered the question depended upon the deed of 1842. That deed of 1842 having been throughout the transaction kept out of the sight of all parties, they could not have fully brought it before the learned judge of the court below, and therefore I refuse to give the costs.

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Mr. *Eddis*.—I appear for co-defendants, and of course it was our interest to support the appeal, and ask for our costs.

THE LORD CHANCELLOR.—You have the benefit of the decree. I shall not give you any costs. In *Johnson v. Legard*(a), you will see the difficulty which there is in creditors of a vendor following an estate contracted to be sold by the insolvent. It seems to have been very much discussed before Lord Eldon.

(a) Turn. & Russ. 281.

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1. Demurrer to a bill by a debtor who had sold certain messuages to his creditors as a security for the debt, but reserving a right of re-purchase within a stipulated term, alleging that, though previously requested to furnish an account, the defendant failed to do so till the morning of the last day of the term, when he rendered an insufficient account—Overruled with costs. *Ponsford v. Hankey and Harrison*, 604

2. Where trustees for creditors neglected, on the application of a creditor, to furnish an account of the

trust estate, and the creditor filed his bill, to which the trustees put in an answer, setting forth an account substantially correct—the Court made the acting trustee pay the plaintiff's costs to the hearing, but gave both trustees their subsequent costs out of the estate. *Springett v. Dashwood*, 521

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1. A plaintiff, who in an insignificant degree obscured the light and air to his own dwelling—*Held*, not thereby disentitled to an injunction to restrain the defendant from erecting a building so as seriously to diminish the supply of light and air.

Nothing short of an act by the plaintiff which will produce somewhat the same amount of injury as that of which he complains, will deprive him of his right to relief in this Court. *Arcedeckne v. Kell*,
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2. The lessee of a dwelling-house in which he carried on business as a diamond merchant—*Held*, entitled to an injunction restraining the owners of premises adjacent (who afterwards purchased the reversion of the plaintiff's house) from constructing the party-wall, which they were about to rebuild so as to occasion such an obstruction of the plaintiff's ancient lights, however slight, as would injure him in his business.

This Court will interfere to restrain apprehended injury, where it is clear the act intended to be committed would injure or destroy a clear legal right. *Herz v. The Union Bank of London*,
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ANNUITY.

Where an annuity was given by

will, charged on the *corpus* of a fund, with a provision for forfeiture in the event of certain contingencies, the Court held that the annuitant was not entitled to have the gross value of the annuity paid out of the *corpus* on the principle of *Wroughton v. Colquhoun*, but was entitled to have the accruing payments of the annuity made good, if necessary, out of the *corpus*, as in *Wright v. Callander*. *Gratrix v. Chambers*,
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is a licence to the assignee to take possession. Therefore an assignment of all the machinery, &c., contained in a schedule, with a proviso that all machinery which should be placed on the premises in addition to or substitution for the machinery assigned should be subject to the trust, was held, to entitle the assignee to machinery added or substituted in priority to a judgment creditor who had taken possession. *Holroyd v. Marshall*, 382

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Where a lease contained covenants not to assign or underlet, with a proviso that in case the tenant should, voluntarily or otherwise, lose possession of the farm, the lessor might re-enter: the Court held that the assignees in bankruptcy of the tenant (the lessor having accepted rent from the assignees) were in by contract with the lessor, and not by operation of law, and were therefore bound by the covenants in the lease.

The assignees, after an injunction restraining them from parting with possession without the lessor's consent, put into possession an agent, who cultivated the farm with his own monies, receiving no wages from the assignees.—*Held*, an invasion of the injunction. *Sir P. H. Dyke v. Taylor*, 566

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BUILDING CONTRACT.

Where a contractor, under pressure occasioned by the refusal of the architect to pay what was justly due under the contract, was induced by the architect to enter into a disadvantageous agreement, the Court set it aside, though by the terms of the original contract the decision of the architect was made final.

Where by contract the award of the architect is final, and is fairly and impartially made, this Court will not relieve against it, however severe it may be in its effects; but where the arbitrator is found guilty of unfairness or partiality, this Court will relieve against his award. *Ormes v. Beadel*, 163

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Forsyth v. Manton considered.
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No person who stands in a relation of special confidence to another, so as to acquire habitual influence over his mind, can accept any gift or benefit from the person who is under the dominion of that influence, unless a sufficient protection has been interposed against the exercise of such influence. *Nottidge v. Prince*, 246

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CONFLICT OF COURTS.

Where this Court had appointed a guardian, and settled a scheme for the education of an infant peer, who

was entitled to large estates in England and Scotland, it restrained the tutor dative from continuing certain proceedings in the Court of Session relative to the education and residence of the infant and as to his English estates which had been instituted in Scotland, so as to supersede the scheme approved by this Court.

The Court of Session has no power to alter, vary, or discharge any order of this Court made under the jurisdiction of the Great Seal; which is as much the Great Seal of Scotland as of England. *The Marquess of Bute v. Stuart*, 582

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1. A plaintiff in contempt is entitled to be heard on his motion to discharge an order made against him at chambers. *Futvoye v. Kennard*, 110

2. Where a defendant in contempt, filed his answer, and the plaintiff, having taken an office copy, filed no exceptions, the answer becoming sufficient:—*Held*, that the plaintiff having thus accepted the answer without insisting on his costs, the defendant was entitled to move to dismiss the bill for want of prosecution. *Herrett v. Reynolds*, 409

3. Where a defendant obtained against a plaintiff who was in contempt for non-payment of costs, an order to stay all further proceedings in the cause until the plaintiff had cleared his contempt or given security first, and afterwards moved

to dismiss the bill for want of prosecution, the Court refused the motion. *Futvoye v. Kennard*, 533

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"Accepting trustees" under the Scotch law, to whom shares in the bank had been on express terms assigned by the testator—*Held*, to be properly placed on the list of contributories. *Re Royal Bank of Australia, ex parte Drummond*, 189

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COSTS.

1. A disentailing assurance necessary to enable a landowner to obtain the purchase-moneys of land taken by a company and paid into court—*Held*, to be "costs in consequence of the purchase," and payable by the company. *Re Devises of Nicholas Brooking v. The South Devon Railway Company*, 31

2. Where the costs are unascertained and the security ample, a mortgagee, after a tender of principal and interest, is not entitled to proceed with the sale—*Semble*. *Jenkins v. Jones*, 99

3. Under common order to tax, the Taxing Master will have regard to an agreement by the solicitor to charge only costs out of pocket.

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Where a creditor, after the Master had reported there were no debts, presented a petition charging fraud, and asking leave to go in and prove against the real estate—there being no receiver and no fund in court—the petition was dismissed, but without prejudice to his filing a bill. *Seale v. Buller*, 312

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DISALLOWANCE OF DEBT.

Where the chief clerk disallowed debts alleged to have accrued due after the testator's death, and distributed the assets, and the creditor, without moving to vary the certificate, filed his bill against the legatees alone for an account, and for repayment of monies paid after the certificate on a continuing obligation of the testator, the Court held the suit maintainable. *Thomas v. Griffith*, 504

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ELECTION.

Under the 145th section of the Bankrupt Consolidation Act, a bankrupt's interest in leasehold property remains in the assignees until they elect not to take the devise; therefore, where the assignees allowed the bankrupt to remain in possession of leasehold premises and pay the rent to the lessor, but afterwards sold without his knowledge—the Court held the sale valid.

Copeland v. Stephens has no

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application where, by virtue of the Act, the bankrupt's estate vests in the assignees. *Cartwright v. Glover*, 620

ELEGIT.

A judgment creditor of a Railway Company, who had obtained an elegit, was restrained from taking possession of the land and chattels belonging to the company as against prior mortgagees to whom were assigned the undertaking, calls on shareholders, and tolls. *Legg v. Mathieson*, 71

EQUITABLE MORTGAGE.

The transfer by a husband of title deeds, of which his wife was equitable mortgagee, to secure a debt of his own, is not a reduction into possession so as to defeat the right of the wife by survivorship.

Bates v. Dandy, *Honner v. Morton*, *Hutchings v. Smith*, considered. *Michelmores v. Mudge*, 183

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EXECUTOR.

Where, on taking an account, a balance was found due to the executor for monies advanced, the estate being insolvent — *Held*, that the executor was entitled to be paid in full, in priority to the creditors. *Spackman v. Holbrook*, 193

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A settlement of real and personal property belonging to the plaintiff, executed in consideration of her marriage with the husband of her deceased sister, set aside, on the ground of failure of the consideration. *Coulson v. Allison*, 279

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Where trustees of certain lands held subject to a mortgage, by a deed conveyed their estate therein to other persons, and the mortgagee filed a bill against them and others to foreclose, alleging that he was

advised the said deed was a breach of trust, to which the trustees demurred—the demurrer was allowed with costs. *Tryon v. The Westminster Improvement Commissioners.*

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On a bill filed against a mortgagor to enforce a forfeiture under the 4th & 5th Wm. & M. c. 16, for concealment of a prior mortgage, the Court held that the statute confers no active remedy in this Court, and dismissed the bill against the mortgagor without costs, and against a puisne incumbrancer with costs.

The statute is penal in its character, and must receive strict construction; therefore neither an equitable mortgagee by deposit of title deeds, nor by deed of further charge without any proviso for redemption, is an after-mortgagee within the meaning of the Act.

Until the legal right to redeem is determined, there can be no equity of redemption within the provisions of the statute. *Kenard v. Futvoye,*

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GROWING CROPS.

The proceeds of growing crops of wheat, oats, rye grass, clover, and trefoil, held to be savouring of the realty, and within the Statute of Mortmain; and therefore not applicable to pay legacies to charities which the testator directed to be paid out of pure personalty. *Symonds v. The Marine Society,* 325

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GUARDIAN AD LITEM.

Upon a petition for payment out of court of a share in a fund standing to a general account in which infants are interested—*Held*, that a guardian *ad litem* of the infants must be appointed, on whom the petition must be served. *Re Trusts of Abraham Ward's Will,* 122

HEIR AT LAW.

Where, in a suit to administer an intestate's estate, the whole of the real estate is applied in payment of the debts, the heir at law is entitled to his costs as between solicitor and client. *Tardrew v. Howell,* 530

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HUSBAND AND WIFE.

Bill by an executor to recover certain securities which the testator had handed to the defendant, his reputed wife, using words of gift, though the interest had been received by both jointly and applied to household expenses, and the testator had bequeathed to her a nearly similar sum—Dismissed with costs. *McCulloch v. Bland*, 428

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INFANT.

Bill by a next friend of an infant to administer an estate, in respect of which, it appeared from the answer, the defendants had already rendered an account in another suit. The defendants submitting that the suit was not instituted for the benefit of the infant—the Court directed an inquiry, whether any benefit had accrued from the suit to the infant; and the chief clerk having certified in the negative, the Court refused to allow the next friend his costs. *Nalder v. Hawkins* considered. *Clayton v. Clarke*, 575

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INSURANCE.

Where the relation of debtor and creditor subsists, and a policy of assurance is effected by the creditor, directly or indirectly, at the expense of the debtor, under circumstances which show that it was intended as a security or indemnity to the creditor, he is bound, on payment of the debt, to deliver up the policy of assurance.

The same principle applies to the case of a life annuity; and accordingly where the grantor came to redeem and repay the principal money, and have the judgment debt due to the grantee satisfied and the securities delivered up, the grantee was decreed on payment to deliver up the policy of assurance.

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Litton v. Litton, *Aylmer v. Aylmer*, *Torre v. Browne*, considered. *Booth v. Coulton*, 514

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JUDGMENT BY DEFAULT.

Judgment by default against an executor in respect of his testator's debt, is an admission of assets, and binds the executor's own real and personal estate as fully as if it were his own debt. Therefore, where an executor allowed judgment to go by default in an action against him as executor—*Held*, that the judgment creditor was entitled to priority over a subsequent judgment obtained against the executor for a personal debt of his own. *Re the Trustee Relief Act*, 10 & 11 Vic. c. 96; *Higgins's Trusts*, 562

JUDGMENT CREDITOR.

A judgment creditor who had obtained judgment against the executor before decree—*Held*, entitled to enforce his judgment under 17 & 18 Vic. c. 125, s. 61, against a debtor to the estate, who in the statute is called the garnishee. *Fowler v. Roberts*, 226

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A mortgagee of leaseholds, who took no steps for fourteen years to realise his security—*Held*, entitled to recover the deficiency arising on the sale of the security against the general assets, but not against legatees who had been paid.

The right of a creditor to make legatees refund may be lost by laches, acquiescence, or by such a course of dealing as would render the assertion of such right inequitable. *Ridgway v. Newstead*, 492

LEASE.

On a proposal to borrow money on the security of a lease, which the borrower said he was entitled to have granted to him, the lender, on the assurance of a letter addressed to his solicitor by the defendant, saying that he was ready to grant the lease, advanced his money on the security of the lease; but it was ascertained that the lessor had previously granted a lease to another person; the Court ordered the lessor to repay the monies, although there was no evidence of deliberate fraud, his defence being that he had forgotten the previous lease. *Slim v. Croucher*, 37

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LEGACY DUTY.

Real estate, devised to trustees with a power of sale, and sold in an administration suit—*Held*, liable to legacy duty.

Where the Court ordered the testator's real estate, out of which his widow was dowable, to be sold free from dower—*Held*, that succession duty was payable on the widow's dower.

Where the testator bequeathed certain monies, believing that he had power to do so, but which were in fact comprised in his marriage settlement, and the legatees elected to take under the will—*Held*, the legacy duty was payable. *Harding v. Harding*, 597

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MARRIAGE ARTICLES.

Where marriage articles directed, if there were but one younger child of the marriage, 8000*l.* to be raised

for portions; if two, 12,000*l.*, and if three or more, 15,000*l.*; and there were three younger children of the marriage, of whom two died infants—*Held*, that the trust to raise 15,000*l.* had arisen, in favour of the surviving younger child. *Hemming v. Griffith*, *Griffith v. Hemming*, 403

MARRIAGE SETTLEMENT.

1. Assets of a testator, settled *bonâ fide* on the marriage of the residuary legatee, are no longer liable to the claims of creditors. Therefore, a bill filed against the residuary legatee and the trustees of the settlement to recover the amount paid by the plaintiff by reason of the testator's breach of the covenants in a lease, was dismissed with costs.

Spackman v. Timbrell considered. *Dilkes v. Broadmead*, 113

2. A covenant by a husband in marriage articles to join his wife in assuring to the trustees all property, real or personal, to which the wife should become entitled or interested in, during the marriage—*Held*, not to bring within the settlement a legacy subsequently given to the wife to be at her own disposal and control, and not to be subject to the *jus mariti*, or liable to be affected by his debts or deeds. *Grey v. Stuart*, 398

3. By a marriage settlement, property belonging to the intended wife was conveyed to trustees upon trust (after the death of the husband and wife) for the children of the marriage in the usual way. It was then declared, that, if all the children should die, the trustees should convey the property to A. B. and C. There never was any issue of the marriage.—*Held*, that although

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the language of the deed only provided for death of issue, the gift over took effect. *Osborn v. Bellman*, 593

4. Bill by infants against the devisee of their grandfather, to establish a settlement of real and personal estate alleged to have been made or promised on the marriage of their parents. The Court, on parol evidence that the marriage had taken place on the faith of representations made by the testator previously to the marriage, and on evidence of representations made by him after the marriage, directed a settlement in accordance with such representations, though the bill was not filed until seventeen years afterwards. *Prole v. Soady*, 1

MENTAL INCAPACITY.

1. Where a vendor of feeble intellect sold his property to a creditor for an inadequate price, the Court—on a bill filed by his heir, impeaching the transaction—set aside the sale, but directed the deed to stand as a security for monies actually due, on the footing of a mortgage.

Mere inadequacy of price is insufficient of itself to vitiate a sale; but where there is weakness in the mental capacity of the vendor, the sale cannot be sustained in this Court, unless the vendor has been adequately protected in the transaction. *Longmate v. Ledger*, 157

2. Gift by a person of weak intellect of her whole fortune to a person who had acquired great influence over her mind, by making her and others believe that he sustained a supernatural character—*Held*, invalid. *Nottidge v. Prince*, 246

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VOID DEED.

MORTGAGE.

A husband having by purchase with his own money obtained a conveyance to himself of freehold lands to which his wife had an incomplete equitable title, deposited the title-deeds to secure a loan to himself, and died having, by his will, given all his real and personal estate to his wife, who, after his death, purchased a judgment debt against her husband's estate, prior in date to the deposit by way of mortgage. On a bill by the mortgagee—*Held*, that his title was paramount to that of the wife, both in her own right and as judgment creditor. *Chesshyre v. Biss*, 287

See ELEGIT.

MORTGAGEE.

NOTICE.

PRINCIPAL AND AGENT.

WILL, 9.

MORTGAGEE.

1. A mortgagee who holds property in pledge is responsible for it in its integrity; therefore a mortgagee of lands containing underneath unopened coal-fields, who allowed the owners of adjacent coal-mines to explore and work the coal, on a bill filed by the mortgagor against him and such coal-owners, was held responsible, and, besides the common decree, the Court directed an

account of all coal worked by the defendants, or either of them, and of the proceeds thereof. *Hood v. Easton*, 692

2. Where a mortgagee, after tender of his principal and interest (the costs being unascertained), sold under the power in his deed, the Court set the sale aside against him and a person who had bought with knowledge of the tender.

A purchaser who buys with knowledge of circumstances, sufficient as against the mortgagee to invalidate the sale, becomes a party to the transaction, and is not protected by the proviso that the purchaser need make no inquiry. *Jenkins v. Jones*, 99

3. The mortgagees of a steamship, who, against the consent of the mortgagor, employed her in trade, whereby they lost large sums, and afterwards sold her by private contract, without notice, to the mortgagor, for less than the amount of the mortgage debt, charged with her value on taking possession.

Whether a mortgagee of a ship is bound to sell her, or whether he may use her as a prudent owner would do—*quære*. *Marriott v. The Anchor Reversionary Company (Limited)*, 457

See COSTS, 2.

FORFEITURE.

LACHES.

NEGLECT.

See ACCOUNT, 2.

NEXT FRIEND.

See INFANT.

NOTICE.

The purchaser of a leasehold having paid part of the price without calling for the title-deeds, was

held fastened with notice of a mortgage by deposit, which was concealed by the vendor, but not with notice of an equitable mortgage, which the vendor had fraudulently effected on the security of a spurious lease of the same property; and the purchaser having obtained an assignment of the valid mortgage, was declared entitled to hold the property as security for the mortgage debt, and for all monies paid by him on the purchase, and for subsequent improvements. *Hipkins v. Amery*, 292

See MORTGAGE.

SPECIFIC PERFORMANCE.

VOID DEED.

NUNCUPATIVE WILL.

See WILL, 7.

OBSCURATION.

See ANCIENT LIGHTS, 1, 2.

OFFICIAL MANAGER.

See STATUTE OF LIMITATIONS, 1.

OMISSION.

See SETTLEMENT, 1.

ORDER.

See CONTEMPT, 1.

PAPER MONEY.

See RIGHT OF ISSUING PAPER MONEY.

PAROL EVIDENCE.

See MARRIAGE SETTLEMENT, 4.

PARTITION.

The Court, in a suit for partition, will not in general direct a

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commission to issue, but will make a declaration that the estate ought to be divided, with liberty to the parties entitled to bring before the judge at chambers proposals for a partition. *Clarke v. Clayton*, 386

PARTNERSHIP.

Where articles of partnership provided that "the goodwill should belong to the partners in the proportion of their shares in the business, but should not be taken into account in the accounts of the partnership;" and that "on the determination of the partnership, a general account and valuation of the property and effects of the partnership should be taken," on the death of one partner—*Held*, that, in the valuation of the partnership property, the goodwill must be included. *Wade v. Jenkins*, 509

PARTY WALL.

See ANCIENT LIGHTS, 2.

PAYMENT OF DEBTS.

See WILL, 9.

PENAL STATUTE.

See FORFEITURE.

PETITION.

See COMPROMISE.

PORTIONS.

See MARRIAGE ARTICLES.

POWER OF ATTORNEY.

See PRINCIPAL AND AGENT.

POWER OF SALE.

See MORTGAGEE, 2, 3.

PROPOSALS AT CHAMBERS.

PRECATORY TRUST.

See WILL, 2.

PREROGATIVE.

See RIGHT OF ISSUING PAPER MONEY.

PRESSURE.

See BUILDING CONTRACT.

PRINCIPAL AND AGENT.

Where a principal, resident abroad, gave a power of attorney to his solicitor in England, with ample powers, but not in terms authorising the agent to borrow money, and subsequently directed him as his agent to do so—*Held*, he could not repudiate a mortgage which the agent had effected in his name. *Perry v. Holl*, 138

See TENANT AT WILL.

PRINCIPAL AND SURETY.

See SURETY.

PRIORITY.

See EXECUTOR.

JUDGMENT BY DEFAULT.

PRIVILEGE.

Communications made before suit by a client to his solicitor concerning the matter in dispute, are not generally privileged; but advice given confidentially to a client, upon such statements, is within the rule. *Bluck v. Galsworthy*, 453

PROMISSORY NOTE.

See WILL, 8.

PROPOSALS AT CHAMBERS.

See PARTITION.

PURCHASE MONIES.

A Railway Act, authorising the purchase-monies of lands taken by the railway to be applied in the discharge of land-tax, or incumbrances, affecting the same or other lands settled to the same uses, or laid out in the purchase of lands, tenements, or hereditaments—*Held*, not to authorise the application of the money in rebuilding a new farmhouse and buildings in purchased lands. *Re Rudyerd's Trusts*, 394

PURCHASER.

See MORTGAGEE, 2.

PURE PERSONALTY.

See GROWING CROPS.

RAILWAY COMPANY.

See COSTS, 1.

ELEGIT.

PURCHASE MONIES.

READY MONEY.

See WILL, 7.

REAL ESTATE.

See CONTEMPT.

REBUILDING.

See PURCHASE MONIES.

RECEIVER.

See CREDITOR.

REDEMPTION.

See ACCOUNT, 1.
FORFEITURE.

REDUCTION INTO POSSESSION.

See EQUITABLE MORTGAGE.

REFORMING SETTLEMENT.

See SETTLEMENT, 1.

RELIGIOUS DOMINION.

See MENTAL INCAPACITY, 2.

REPAIR (OUT OF).

See VENDOR AND PURCHASER, 1.

REPAIRS.

See SPECIFIC PERFORMANCE.

REPURCHASE.

See ACCOUNT, 1.

REPUTED GIFT.

See HUSBAND AND WIFE.

RESERVOIR.

See WATERCOURSE.

RESIDUARY DEVISE.

See SPECIFIC DEVISE.

RESIDUARY GIFT.

See WILL, 3.

RESIDUARY LEGATEE.

See MARRIAGE SETTLEMENT, 1.

RESTORATION.

See WASTE.

RESULTING TRUST.

See WILL, 4.

REVERSIONARY INTEREST.

See WILL, 3.

REVERSIONER.

See ANCIENT LIGHTS, 2.

RIGHT OF ISSUING PAPER MONEY.

The defendants having manufactured a large quantity of printed paper to represent the public paper-money of the kingdom of Hungary, in order to use it, when opportunity should occur, for purposes hostile to the sovereign ruling power of that kingdom—they were restrained, at the suit of the Emperor of Austria, as King of Hungary, and decreed to deliver up the paper to be cancelled, and restrained by perpetual injunction from manufacturing such paper.

The law of nations is part of the common law of England ; and money being the medium of commerce, a foreign sovereign at peace with the Crown of England, suing in this Court to protect his prerogative right of issuing coin or paper money, will have his right protected from invasion. *The Emperor of Austria v. Day and Kossuth*, 628

RIGHT TO SUE.

See RIGHT OF ISSUING PAPER MONEY.

RULE OF COURT.

Where a decree sanctions a reference to arbitration, and directs that either party may apply to make the award a rule of Court, such application should be made on notice. *Lipscombe v. Palmer*, 447

See BUILDING CONTRACT.
COMPROMISE.

SALE.

See CHATTEL.
COSTS, 2.
MORTGAGE.
MORTGAGEE, 2, 3.
TRUSTEE FOR SALE.

SETTLEMENT.

SALE BY COURT.

See LEGACY DUTY.

SCAFFOLDING.

See WILL, 5.

SECRET BARGAIN.

See VENDOR AND PURCHASER, 2.

SECURITY.

See SURETY.

SEPARATE USE.

See MARRIAGE SETTLEMENT.

SERVICE OF PETITION.

See GUARDIAN AD LITEM.

SERVICE (SUBSTITUTED).

Where a defendant, against whom a decree had been made, was permanently resident abroad, the Court ordered service of the decree on his solicitor in the cause to be deemed good service. *Griffiths v. Cooper*, 230

SETTING ASIDE SALE.

See MENTAL INCAPACITY, 1.

SETTLEMENT.

1. The principle on which the Court reforms a settlement, is to make it conform to what was the real agreement. But the Court will not interfere to alter or reform a settlement on the ground that a stipulation or limitation which was wished for, and intended by one of the contracting parties, but never agreed to or mentioned to the other, has been omitted from the settlement. *Elwes v. Elwes*, 545

2. Bill by a tenant for life to set aside a settlement of the family

estates, by which his estate tail had been converted into an estate for life, with remainder to his sons in tail male, and in default of such issue, with general power of appointment. It appearing that there had been sufficient explanation to enable any man of ordinary intelligence to understand the effect of the deeds, and the only evidence in favour of the plaintiff being his own denial on oath—the Court dismissed the bill with costs. *Jenner v. Jenner*, 232

See MARRIAGE SETTLEMENT, 1, 2, 3, 4.

SHARES.

See CONTRIBUTORIES.
PARTNERSHIP.

SHARES IN ASSURANCE
COMPANY.

See WILL, 7.

SOLICITOR.

See SERVICE (SUBSTITUTED).
STATUTE OF LIMITATIONS, 1.

SOLICITOR AND CLIENT.

See PRIVILEGE.

SPECIAL CONFIDENCE.

See CONFIDENTIAL RELATION.

SPECIAL VALUE.

See CHATTEL.

SPECIFIC DEVISE.

The Wills Act, 1st Vict. c. 26, has not altered the rule of law that every devise of real estate, though in terms residuary, is, in fact, specific. *Pearmain v. Twiss*, 130

SPECIFIC PERFORMANCE.

Specific performance of an agreement to take a lease decreed where the defendant, knowing that the premises were greatly out of repair, stipulated for certain specific repairs, which were done accordingly, but took possession after being warned that much more extensive repairs were required, and it turned out on examination after he had taken possession, that it was necessary to take down and rebuild a wall at great expense. *Cook v. Waugh*, 201

See VENDOR AND PURCHASER, 1, 2.

STATUTES.

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6 WILL. 4, c. 76 (Newcastle-on-Tyne and North Shields Railway Company)	395
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19 & 20 VICT. c. 47	. . .	44
21 & 22 VICT. c. 27	. . .	170
22 & 23 VICT. c. 35	. . .	117

STATUTE OF LIMITATIONS.

1. Where solicitors of a Joint Stock Company, after an order to wind up, delivered up documents to the official manager on his undertaking that they should be paid out of the first monies in their hands, and allowed nine years to elapse before delivering their bill (the official manager having until then had no funds in his hands), the Court held that the claim was not barred by the Statute of Limitations.

After such delay, the solicitors were entitled to have a call made to satisfy their demand,—*quære.*

Re Gloucester and Aberystwith Railway Company, 47

2. The order to wind up a Joint Stock Company under the Acts of 1848-9, does not suspend the operation of the Statute of Limitations.

The orders for fixing a time under the 84th section of the 19 & 20 Vict. c. 47, within which claims must be preferred, are applicable to cases under the Winding-up Acts of 1848-9.

Semble, there is no analogy between the administration of assets in bankruptcy and under the Winding-up Acts, on the question as to the Statute of Limitations. *Re Winding-up Acts, 1848-9; Royal Bank of Australia,* 42

STATUTE OF MORTMAIN.

See GROWING CROPS.

SURETY.

STAY OF PROCEEDINGS.

Where a defendant out of court has conceded the relief asked by the bill, the Court, on motion by the plaintiff, stayed all proceedings in the cause, and ordered the defendant to pay the costs of the suit.

North v. The Great Northern Railway Company, 64

See CONTEMPT, 3.

STEAM-SHIP.

See MORTGAGEE, 3.

STRICT CONSTRUCTION.

See FORFEITURE.

SUBMISSION.

See STAY OF PROCEEDINGS.

SUBSEQUENT IMPROVEMENTS.

See NOTICE.

SUBSTITUTED CHATTELS.

See ASSIGNMENT.

SUCCESSION DUTY.

See LEGACY DUTY.

SUFFICIENT DESCRIPTION.

See WILL, 7.

SURETY.

The holder of a dishonoured promissory note, who had obtained from the maker security—decreed to deliver up such security to a surety who had become liable by the default of the principal, and had paid the amount into court. *Goddard v. Whyte,* 449

TRUSTEE FOR SALE.

SURVIVORSHIP, RIGHT OF.

See EQUITABLE MORTGAGE.

TENANT AT WILL.

Where the managing body of a religious society appointed an agent at a salary, with "six months' notice of separation on either side," with liberty to occupy and carry on his trade in a house belonging to the society, and afterwards summarily dismissed him for alleged misconduct, and resumed the possession of the house, of which they were afterwards forcibly dispossessed by the agent: on a bill filed by the managing body, the Court granted an injunction to restrain such agent from disturbing their possession. *Spurgin v. White*, 473

TENDER.

See COSTS, 2.
MORTGAGEE, 2.

TITLE DEEDS.

See EQUITABLE MORTGAGE.

TRIFLING OBSTRUCTION OF LIGHT.

See ANCIENT LIGHTS, 2.

TRUST MONIES.

Trust monies settled on such trusts as the plaintiff should by deed or will appoint, ordered to be paid the plaintiff. *Watts v. Campbell*, 112

See MARRIAGE ARTICLES.
WILL, 1, 2, 3, 4, 5.

TRUSTEE FOR SALE.

A trustee for sale is bound to obtain the best price for the property. Therefore, where the trustee

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contracted to sell the estate, though with the consent of all the *cestuis que trust*, except the assignee of one share, for less than was offered by such assignee, the Court annulled the contract, and deprived the trustee of the costs of the suit. *Ord v. Noel* considered. *Harper v. Hayes*, 210

TUTOR DATIVE.

See CONFLICT OF COURTS.

UNDERTAKING.

See STATUTE OF LIMITATIONS, 1.

USER.

See WATERCOURSE.

VALUATION.

See PARTNERSHIP.

VENDOR AND PURCHASER.

Where a house was described as substantial and convenient, and having five bed-rooms. On a bill filed for specific performance—*Held*, that this was no misdescription, although the house was out of repair, and the walls in some places were only half-brick thick, and some of the bed-rooms extremely small inner rooms, and without fire-place. *Johnson v. Smart*, 151

2. A purchaser is not at liberty to use information derived from the abstract for his own advantage, adversely to the vendor. Therefore, where a purchaser having ascertained that the concurrence of the heir was required to complete the title, gave notice to rescind the contract, and bought up the interest of the heir, the Court decreed specific

performance of the contract with costs, but allowed him to deduct from the price the sum he paid to the heir. *Murrell v. Goodyear*, 51

See MENTAL INCAPACITY.

VESTING.

See ELECTION.

VOID DEED.

The plaintiff, a mortgagee of leasehold premises, was induced by the mortgagor (his solicitor) to execute certain deeds, represented as being leases, but by which, in consideration of a sum never in fact paid, the plaintiff was made to assign the premises by way of sale, to a female servant, by whom they were afterwards mortgaged for value to the defendants. On a bill by the first mortgagee to set aside these deeds, the Court held that they were wholly void, and decreed them to be delivered up to be cancelled. *Ogilvie v. Jeaffreson*, 353

WAIVER OF COSTS.

See CONTEMPT.

WASTE.

Injunction granted on a bill by a churchwarden, on behalf of himself and the parishioners, to restrain the incumbent, and his agents, from dismantling the church and selling the pews, &c., with a view to improve the building, the incumbent having obtained no faculty. The Court ordered that the plaintiff and defendants be at liberty to lay before the judge in chambers proposals for fitting up the interior of the church, such proposals to be subject to the approbation of the bishop; and, on the chief clerk's certificate of plan approved by the

bishop of the diocese, the Court ordered the adoption of the plan. *Cardinal v. Molyneux*, 535

See MORTGAGEE.

WATERCOURSE.

Claim by the plaintiff to use water which flowed from his land to the defendant's land, and was there collected, in a reservoir, whence it flowed into the plaintiff's land.

Claim also by the plaintiff to the overflow into his land of a pond, which flowed through the defendant's land into that of the plaintiff. The claims being unsupported by evidence of twenty years' user—*Held*, they could not be maintained.

But, *Held*, that the plaintiff was entitled to water flowing from surface springs in the defendant's lands, and which naturally flowed, but not through perfectly defined channels, into the plaintiff's land; and was entitled to an injunction to restrain the defendant from diverting it. *Ennor v. Barwell*, 410

WEAK INTELLECT.

See MENTAL INCAPACITY, 1, 2.

WIFE.

See HUSBAND AND WIFE.

WILL.

1. Where a testator, in his will, calls the son of his own illegitimate son his grandson, having no legitimate son, after giving his property to be divided between his son and daughter's children, and if there should be no grandchildren, then a gift to his nephew—the Court held that a legitimate daughter of the

testator's illegitimate son was within the description of grandchildren.

Allen v. Webster, 177

2. A testator gave his personal estate to his wife, declaring, although he had given her the whole, he desired, if his children conducted themselves to her approbation, she would leave such property equally amongst all his children. The widow, by her will, gave the property to those living at her decease. The Court held, the widow took subject to a trust, and on both wills declared the four surviving children entitled. *Bonser v. Kinnear*, 195

3. A testator, being an officer on service abroad, who was entitled to a remote reversionary interest in a large sum of stock, after giving two legacies of 10*l.* each and specific legacies of his carpet bag, portmanteau and sea chest, directed that the remainder of his money and effects might be expended in purchasing a suitable present for his godson (a child a year old).—*Held*, that the reversionary interest did not pass.

Borton v. Dunbar, 221

4. Where the devisee for life, of leaseholds for life, in the erroneous belief that he was bound to renew, insured the lives of the younger *cestui que vie* in the names of himself and the executors, and paid the premiums, and died, leaving the executors him surviving—*Held*, that the insurance monies were subject to a resulting trust in favour of the devisees under the will, but that the estate of the tenant for life was entitled to the bonuses, but not to be recouped the amount of the premiums. *Browne v. Browne*, 304

5. On a gift by a testator of all his freehold house and property, situate in Wright's Road, the Court held that scaffolding and building

materials situate on the ground near the house, did not pass. *Conway v. Vernon*, 277

6. Gift by a testatrix to trustees, of a debt of 1000*l.* on trust to invest the same in stocks or real securities, and to stand possessed of the debt, and interest, and of the stocks, funds, and securities, on trust thereout to pay the plaintiff an annuity of 30*l.* and to pay three-fourths of the residue of the interest or dividends received from the said debt, or the investment thereof, to his daughter Mary; and after plaintiff's death he gave four tenths of the debt of 1000*l.* to his daughter Mary.

By his codicil, the testator revoked the gift of four-tenths of 1000*l.*, and gave instead thereof three-tenths of the debt, on the same trusts as the four-tenths.—*Held*, that the annuity was a charge on the capital of the debt of 1000*l.* *Hickman v. Upsall*, 124

7. Shares in an Assurance Company, enclosed in an envelope and indorsed "to be considered as ready money and given to" testator's wife—*Held*, to pass under a bequest of "all sum and sums of money that might be in the house." *Knight v. Knight*, 616

8. A testator gave a promissory note to G., saying, he wished to provide, otherwise than by will, for the plaintiff; and afterwards made his will, appointing G., with others, his executor, and to whom, after payment of legacies, he bequeathed a moiety of his personal estate. G. having made some payments on account to the plaintiff, afterwards denied her title. *Held*, he was a trustee of the note for the plaintiff. *Lloyd v. Chune*, 441

9. Where a testator, having given

all his personal estate to his executrix absolutely, directed all his debts, &c., to be paid by his executors out of his estate, and devised his real estates, which were subject to a mortgage, for the benefit of his children—*Held*, that on the true construction of the statute 17 & 18 Vic. c. 113, the direction to the executors to pay the debts, exonerated the devised estate from the mortgage debt. *Woolstencroft v. Woolstencroft*, 192

See LEGACY DUTY.

YOUNGER CHILD.

WILLS ACT.

See SPECIFIC DEVISE.

WINDING-UP ACTS.

See CONTRIBUTORIES.

STATUTE OF LIMITATIONS.

YOUNGER CHILD.

See MARRIAGE ARTICLES.

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